REFORMING FCC PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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REFORMING FCC PROCESS

WEDNESDAY, JUNE 22, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:32 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Terry, Shimkus, Bono Mack, Bilbray, Bass, Blackburn, Scalise, Latta, Guthrie, Kinzinger, Barton, Upton (ex officio), Eshoo, Doyle, Barrow, Christensen, Dingell, and Waxman (ex officio).

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Michael Beckerman, Deputy Staff Director; Paul Cancienne, Policy Coordinator, CMT; Nicholas Degani, Detailee, FCC; Andy Duberstein, Special Assistant to Chairman Upton; Neil Fried, Chief Counsel, C&T; Debbee Keller, Press Secretary; Carly McWilliams, Legislative Clerk; Jeff Mortier, Professional Staff Member; David Redl, Counsel, Telecom; Shawn Chang, Democratic Counsel; Jeff Cohen, FCC Detailee; Sarah Fisher, Democratic Policy Analyst; and Roger Sherman, Democratic Chief Counsel, Communications and Technology.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Good morning and welcome. Before I begin my opening statement regarding FCC process reform that brings us together here today, I just wanted to update our members of the committee on the ongoing efforts on our top issue, which is related to spectrum auctions and public safety networks. Key staff on both sides of the aisle, along with Ms. Eshoo and myself, have been meeting regularly for several weeks to see if we can come together on a bipartisan agreement on spectrum legislation. These talks continue to make progress, and I appreciate the good faith effort on both sides and especially where the real work gets done—at the staff level.

And I think we all know and are keenly aware that time is of the essence and we need to move to a conclusion at an appropriate time given the needs of public safety and the anniversary of 9/11. Meanwhile, though, our subcommittee can walk and chew gum at the same time so we have many other issues before us, including FCC process reform, which is the subject of today's hearing.

We have before us a diverse panel of experts representing industry, think tanks, consumer groups, academia, and the States to testify on ways to improve the transparency and accountability of the FCC. To keep our discussion grounded, I have also circulated to my colleagues on the subcommittee and these experts a discussion draft of legislation. Again, I point out it is a discussion draft. That is what we are going to have today.

I view that legislative language as a starting point for today's conversation, and I thank all of you for your thoughtful analysis of the draft legislation and your testimony. I have heard from many who track these issues that they appreciate actually having a "draft" document to review from which to make more informed comments, perhaps a process we could institute in certain independent agencies. This is the kind of process I would like to see used more often at the FCC. I look forward to you sharing your thoughts and ideas about best practices for this Agency.

Now, at our last hearing, we heard from the FCC Chairman and his fellow commissioners. They testified on what was working at the FCC, recent improvements in the FCC's processes, and what could still be improved. The hearing has made me an optimist. Chairman Genachowski explained the Agency has already improved the transparency of the Commission in several regards—by publishing the specific text of proposed rules, by releasing orders shortly after adoption, and by proposing to eliminate unnecessary and outdated regulations. But all of this is discretionary.

Congress has the authority and I believe the responsibility to ensure that the Agency—which is conducting the public's business—does so with transparency and accountability, regardless of who is currently the chairman. It is not asking too much to have the FCC actually codify a set of best practices and then operate by them.

One idea in this mold is to ask the FCC to establish shot clocks so that parties know how quickly they can expect action in certain proceedings. Another is to ask the FCC to establish a means for the public to know the status of the rulemakings and other proceedings pending before the Commission. And another is to ask the FCC to establish procedures for a bipartisan majority of commissioners to actually be able to initiate a proceeding. By asking the FCC to regulate itself, we can give the Agency the flexibility it needs to act while guarding against a lapse in the Commission's practices. It is not my intent to micromanage every decision and this legislation does not do that.

In considering other reforms, we must balance the need for congressional and public oversight of the Commission with the flexibility the Commission needs to promote competition in the marketplace. For example, the Administrative Conference of the United States recently recommended 60-day comment periods for "significant regulatory actions," as well as reply comment periods "where appropriate." One idea is to strike a middle ground, requiring comment and reply comment periods of 30 days apiece but only when the APA already requires the Commission to issue a NPRM.

Another idea is to extend to the FCC the cost-benefit analyses currently required of executive agencies and endorsed just this year in President Obama's Executive Order on regulatory reform. Cost-benefit analyses are valuable because they require an agency to

squarely address the cost of regulation, determine whether other methods may be less costly, and make a reasoned determination that the benefits outweigh the costs. If the President's requirement is good enough for the Department of Education and the Environmental Protection Agency, why not the FCC?

And trust me, the old argument that such a requirement will bog down the agency just doesn't cut it. I have never met an agency that didn't use this argument, yet they always seem to find money to buy new vehicles and buildings.

Finally, it may be possible to tighten the FCC's transaction review standards to harms that directly arise from the transaction before it. Such a requirement is not meant to displace the standard of review but to focus the Commission's enquiry. If the Commissions Act empowers the FCC to review a transfer of broadcast licenses but not other aspects of a transaction, the FCC should review that transfer of broadcast licenses and not other aspects of the transaction. That is what their underlying statute says.

These ideas are not the end of the discussion but the beginning, and I look forward to the thoughts of my colleagues and the panelists on moving forward.

As I said at the outset, this is a discussion draft, and I am open to the input of our panelists—that is why you are here—and to the input of the public and my colleagues. When it comes to improving the transparency, accountability, and efficiency of the FCC, I am convinced we can find common ground.

With that, I would yield to Ms. Blackburn for the remainder of time she may consume.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

(Good morning. Before I begin my opening statement regarding FCC process reform, I wanted to update members of the committee on the ongoing efforts on our top issue: spectrum auctions and public safety networks. Key staff on both sides of the aisle, along with Ms. Eshoo and I, have been meeting regularly for several weeks to see if we can come to a bipartisan agreement on spectrum legislation. These talks continue to make progress, and I appreciate the good faith commitment of the staffs to this work and know that all involved are keenly aware of the need to move toward a conclusion soon, given the needs of our public safety community and the anniversary of 9/11. Meanwhile, our subcommittee has other work it can and must also undertake, including our continuing efforts to modernize and standardize the processes of the FCC, which is the focus of today's hearing.)

We have before us a diverse panel of experts-representing industry, think tanks, consumer groups, academia, and the states-to testify on ways to improve the transparency and accountability of the FCC. To keep our discussion grounded, I have also circulated to my colleagues on the Subcommittee and these experts a Discussion Draft of legislation; I view that legislative language as a starting point for today's conversation, I thank all of you for your thoughtful analysis of the draft legislation and your testimony. I've heard from many who track these issues that they appreciate actually having a "draft" document to review and from which to make more informed comments. This is the kind of process I'd like to see used more often at the FCC. I look forward to you sharing your thoughts and ideas about best practices for the agency.

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On that note, I yield my remaining time to Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman. I appreciate the legislation that you are bringing forward. I do believe it is a starting point for us to address the crisis of confidence that many now have with the FCC. But we need to move the Agency away from being an institution driven by activists pursuing social outcomes to one grounded in regulatory humility and statutory obedience.

Congress should slam the FCC's regulatory backdoor shut, lock it, and return the keys to the free market. And any new regulations must require concrete examples of market failure and true consumer harm, because there is no room for additional burdens on American industries and consumers without showing just cause.

We need stronger accountability and transparency of the Agency to ensure that it operates within its legal boundaries. I thank you for the time, and I yield back.

[The prepared statement of Mrs. Blackburn follows:]

PREPARED STATEMENT OF HON. MARSHA BLACKBURN

Thank you Mr. Chairman. I appreciate the legislation you are bringing forward. I do believe it is a starting point for us to address the crisis of confidence that many now have in the FCC.

But, we need to move the agency away from an institution driven by activists pursuing social outcomes to one grounded in regulatory humility and statutory obedience. Congress should slam the FCC's regulatory back-door shut, lock it, and return the keys to the free market.

Any new regulations must require concrete examples of market failure and true consumer harm because there is no room for additional burdens on American industries and consumers without showing just cause.

We need stronger accountability and transparency of the agency to ensure it operates within its legal boundaries.

Mr. SHIMKUS. Will the gentleman yield for just one second?

Mr. WALDEN. Yes.

Mr. SHIMKUS. I would like the time to welcome my former classmate, former Senator John Sununu. He is at the panel and it is good to see him on that side.

Mr. SUNUNU. Thank you very much, Congressman Shimkus. It is very nice to be here. You know, I could never get on a Commerce Committee when I was in the House. That is part of the reason I ran for the Senate. But I did notice that I am at the kids' table here, a little sweet, but I am grateful to be here nonetheless.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. WALDEN. That is fine. And we have always wanted to have you before us and John has a lot of questions for you, Senator.

I now turn to the ranking member of the subcommittee, my friend and colleague from California who is nursed back to health after her surgery, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman. And good morning to you, to all of the members and thank you to all the witnesses that are here today.

Today's hearing continues our discussion of FCC process reform, and I think that it is important for us to keep pressing ahead on this, examine the suggestions that have been made, and hear from a variety of witnesses about their ideas and their comments on what we are considering.

Last month's subcommittee hearing highlighted that the Commission has really taken some proactive steps to increase openness, transparency, and accountability. And these efforts should be applauded as we examine legislative measures that might help to enhance the FCC's effectiveness.

I want to thank Chairman Walden for incorporating the FCC Collaboration Act into the draft legislation under discussion today. This is bipartisan reform which was introduced with Representative Shimkus and Doyle earlier this year and it would promote greater collaboration by allowing three or more commissioners to talk to each other outside of an official public meeting.

As part of this Sunshine reform, I am very pleased that the discussion draft also incorporates federal/state joint boards. During last month's hearing, Commissioner Clyburn described how commissioners have to rotate in and out of these meetings and how a

modification of the Sunshine Act would enhance joint board recommended decisions. Allowing FCC commissioners to collaborate more freely as part of their participation on federal/state joint boards makes sense. And I think it serves to strengthen our original legislation.

As I noted in last month's hearing, though, I think that we need to be cautious of legislative proposals which might or could diminish the Commission's ability to protect the public interest and preserve competition. I think those are two very, very important values that need to be retained. I fully support reforms that will better serve the public good, but they shouldn't be done at the expense of overly prescriptive rules that limit the FCC's flexibility and decision-making process.

Our witnesses today come from many backgrounds, including industry, the public interest, and academia. You bring years of experience working with the FCC both inside and outside the Agency. And so I especially look forward to hearing your thoughts on the draft legislation. So we have a lot of work to do. We have the spectrum legislation that really needs to move forward that will usher in a new era of telecommunications, its applications in the 21st century, and we have reforms to make. And I look forward to hearing from our witnesses today. And thank you, Mr. Chairman, for holding this.

I would like to yield the remainder of my time to Congressman Doyle.

Mr. DOYLE. Thank you very much.

Mr. Chairman, thank you for holding this hearing. And we want to thank the distinguished panel of witnesses and our former colleague, John Sununu, for being here this morning to educate us about the important issue of FCC process reform. Mr. Chairman, while I appreciate your hard work to examine ways to update FCC process, I am somewhat concerned about certain aspects of the draft bill before us and look forward to working with you on that.

The most troubling part is two things that concern me is one that we would limit the power of the Commission to impose conditions or voluntary commitments on the transactions it reviews. While conditions shouldn't serve as excuses for the FCC to permit a transaction if it fails to serve the public interest, if a merger is approved, the FCC should impose conditions it deems necessary to meet its public interest standard.

It also concerns me that we would require a Notice of Inquiry before every single NPRM. I think that this can be burdensome and I think this is something that is better left to the FCC.

I do want to thank you for including the language of the Sunshine Reform bill that Congressman Shimkus and Congresswoman Eshoo and I have put forward. We think that would increase transparency and improve communication within the Agency. I look forward to hearing the testimony of all the witnesses today. Mr. Chairman, I look forward to working with you.

And I yield back.

Mr. WALDEN. The gentleman yields back his time. I now recognize the chairman of the full committee, the gentleman from Michigan, Mr. Upton, for 5 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, Mr. Chairman. And I certainly want to welcome our great friend Mr. Sununu as well.

The communications and tech sector is one of the largest drivers of our economy. And at a time when overall job creation remains weak and burdensome rules and red tape are keeping job creators on the sidelines, we should be doing everything that we can to unleash the creativity and innovative potential of this sector. Eliminating outmoded rules, removing regulatory barriers, and refraining from imposing new ones on this segment of our economy could do a lot to help spur jobs and help pull us out of our fiscal doldrums.

Chairman Genachowski appears to recognize this. While the proof will be in the pudding, he is at least saying he plans to abide by the President's Executive Order on regulatory reform even though independent agencies are not required to do so. And my hope is that he will submit to us and the administration the formal plan requesting OIRA to implement the Executive Order.

If we want to improve the regulatory environment, process reform is an obvious place to start. The FCC's decisions can only be as good as its process. And while the FCC has taken steps to improve the way that it conducts its business, more can be done. Today, we will examine a draft proposal, a good one, to set statutory baselines to ensure this and all future commissions address all the issues with the same minimum sound practices.

Consistency and transparency not only produce better decisions, they help create confidence and certainty that will promote investment, innovation, and jobs. An expert, independent agency should also be engaging in objective analyses. And if it looks like the FCC is prejudging an issue and justifying predetermined outcomes after the fact, the Agency looks political and the public loses faith in its objectivity and expertise.

It is important to recognize that this staff draft preserves much of the Agency's flexibility. Indeed, in most cases, it simply directs the FCC to set its own rules on these matters. My sense is that it does strike the right balance, but I of course welcome input from my colleagues and witnesses. Our hope is that we can produce strong bipartisan legislation.

And I yield the balance of my time to Mr. Terry.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

The communications and technology sector is one of the largest drivers of our economy. At a time when overall job creation remains weak and burdensome rules and red tape are keeping job creators on the sidelines, we should be doing everything we can to unleash the creativity and innovative potential of this sector. Eliminating outmoded rules, removing regulatory barriers, and refraining from imposing new ones on this segment of our economy could do a lot to help spur jobs and help pull us out of our fiscal doldrums.

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If we want to improve the regulatory environment, process reform is an obvious place to start. The FCC's decisions can only be as good as its process. While the FCC has taken steps to improve the way it conducts its business, more can be done. Today, we will examine a draft proposal to set statutory baselines to ensure this and all future commissions address all issues with the same minimum sound practices.

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It is important to recognize that this staff draft preserves much of the agency's flexibility. Indeed, in most cases, it simply directs the FCC to set its own rules on these matters. My sense is it strikes the right balance, but I of course welcome input from my colleagues and the witnesses. My hope is that we can produce strong legislation that enjoys bipartisan support.

I thank the witnesses and look forward to their testimony. I yield the balance of my time to Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman.

And during our last hearing on this subject on May 25, we heard from the current FCC chairman and commissioners themselves, many of whom spoke in favor of the concepts contained in our draft before us today. Chairman Genachowski recognized that shot clocks could be an "effective tool" going forward. Commissioners Copps and McDowell agreed there should be a mechanism for a bipartisan majority of commissioners to put items on the agenda meetings. And Commissioners Copps and Clyburn spoke of the need to reform the Sunshine rules to allow the commissioners to deliberate more efficiently.

Now, as we work through here today, we are going to get our witnesses' input to see how we can improve, continue working with our friends on the other side to make this bipartisan. Frankly, these are issues that the commissioners, past and present, have brought forward needing change. Some they can do on their own; some need our assistance. And we want to continue to work with everybody.

So I welcome the testimony from our witnesses and look forward to moving this legislation.

Do any other members on the Republican side seek time? There is a minute and a half left.

Then I yield back.

Mr. WALDEN. The gentleman yields back his time. I now recognize the ranking member of the full committee, Mr. Waxman, for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman.

Today, the subcommittee will return to the topic of FCC reform and I commend Chairman Walden for working with us to put together a balanced panel of expert witnesses. We need to hear from diverse voices, and Chairman Walden has worked with us Democrats and Republicans together to assemble balanced witness panels.

I also wish to commend the chairman for the draft legislation we will be considering today. Unfortunately, it has serious defects. It would make the FCC less efficient and more bureaucratic in my opinion, the exact opposite of what we should be doing.

I am a proponent of strong congressional oversight over the agencies within our jurisdiction. An engaged Congress can help agencies perform at a higher level and serve the American public better. In some instances, it is appropriate for Congress to legislatively modify the authority or practices of an agency to enhance agency operations and the public interest. At our first hearing on this topic, I asked basic questions that will guide me in determining whether we are promoting smart regulation and this bill does not provide reassuring answers.

The first problem is that this legislation will create an undue burden on the FCC. It requires that the Commission perform a cost-benefit analysis for every rule that might impose a burden on industry. This will be costly and time consuming. Cost-benefit analyses might be appropriate for a limited set of major rules, but in no circumstances should they become a basis for years of litigation in court.

Second, the legislation undermines the flexibility of the Agency to act quickly and efficiently in the public interest. If we put new prescriptive process requirements in statute, we can end up promoting slower, not faster, decision-making. For example, the requirement that the FCC conduct a Notice of Inquiry prior to moving to rulemaking could restrict the Agency's ability to move more expeditiously in the public interest.

Third, some of the requirements in the draft legislation appear to be about process for the sake of process. Provisions in the rulemaking reform section and the transparency reform section impose practices that the Commission already follows. Chairman Genachowski's tenure has been marked by greater transparency, expanded opportunities for public input, and improved information-sharing with other commissioners and the public. He has shown that the FCC can reform itself without the need for action by Congress.

And finally, I am concerned that we are making procedural changes in an attempt to address outcomes with which we don't agree. Chairman Walden and others have criticized the voluntary commitments Comcast agreed to during review of its combination with NBC Universal. That appears to be why the current draft legislation radically alters the FCC's authority under the Communications Act and could eviscerate the public interest standard. Before we take steps that could prevent combinations like Comcast/NBC, we need to examine whether they are in the interest of promoting public benefits or even in the interest of the companies they are intended to protect.

There are some promising aspects of the legislation in particular I want to join my colleagues in support of the provisions that allow commissioners to collaborate more directly, but overall, I cannot support the draft in its current form. The chairman has said he wants to work together in a bipartisan way to improve this bill. I hope we do that and produce a bill that earns broad bipartisan support.

I look forward to hearing from our panel to address these issues into receiving their advice about how to improve the FCC. Thank you, Mr. Chairman, and yield back the balance of my time, unless, Ms. Christensen, would you like any of my time? I yield back.

Mr. WALDEN. Thank you. The gentleman yields back his time, and now we will proceed with the hearing. And we would like to welcome all of our witnesses. And we will start with the Honorable John E. Sununu, Honorary Co-Chair, Broadband for America. And I would just advise the witnesses, these microphones, you have to get pretty close to and the button turns them on and off. And then we have the red light buttons there that control the time.

And with that we welcome our friend and colleague, Mr. Sununu.

STATEMENTS OF JOHN SUNUNU, HONORARY CO-CHAIR, BROADBAND FOR AMERICA; KATHLEEN ABERNATHY, CHIEF LEGAL OFFICER AND EXECUTIVE VICE PRESIDENT, FRONTIER COMMUNICATIONS; BRAD RAMSAY, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; MARK COOPER, RESEARCH DIRECTOR, CONSUMER FEDERATION OF AMERICA; RONALD M. LEVIN, WILLIAM R. ORTHWEIN DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW; AND RANDOLPH J. MAY, PRESIDENT, FREE STATE FOUNDATION

STATEMENT OF JOHN SUNUNU

Mr. SUNUNU. Thank you very much, Chairman Walden, Ranking Member Eshoo. It really is a pleasure to be here.

As you indicated, I am, along with Harold Ford, a co-chair of Broadband for America, an organization of 300 members, equipment manufacturers, broadband providers, applications providers, consumer advocate groups, economic development groups. And the focus is really on deployment and investment in the broadband industry and identifying public policy that can really ensure that it continues to be a driver of growth and prosperity in America.

I certainly commend you for looking at the topic and your pursuit of improving the way the FCC operates. Without question, the focus of the discussion draft is on process and process matters. Process is the mechanism by which we ensure better transparency, fairness, certainty, clearer timelines, and all of those help to allow investors to make investments with a greater certainty of return and that is what promotes economic development and job creation.

I do also, however, want to take the opportunity to talk in a little bit more broad terms about changes that we would like to see the committee look at within the statutory framework because in many regards, the obsolete premises of the existing statutory framework doesn't match the structure and the competition that we see in the marketplace today. And that is, I think, a view that is shared on a bipartisan basis. Chairman Genachowski recently acknowledged that the statute isn't perfect and said "it would make sense to update it." The President's State of the Union address talked about the fact that, you know, we live in a business and information age, but the last major reorganization of government happened in the age of black-and-white TV. So these issues—and I think the comments of the committee recognize—aren't directed at any commis-

sion, any chair, or any administration. It is a matter of making sure that the policies reflect the modern age in which we live.

We do have a very vibrant, competitive communications base that is more vibrant and competitive than ever. There are always going to be aspects that we want to see operate better or even more competitive that would bring down prices even faster, but it is more vibrant and competitive than ever before, across the entire spectrum of voice, video, data, and other emerging internet-based services.

Over the last 3 years within the broadband industry, we have seen $250 billion in capital investment. This is during a period of a very sharp and significant economic downturn. I don't think we can find many areas of the economy that have made that level of capital investment. And again, there are always going to be areas where we want to see access improved or accelerated even more, but $250 billion is real money even to the United States Congress.

The Communications Act of 1934 is built on the assumption of a natural monopoly. And I think if there is one point that I want to make it is that that is the default presumption. And unfortunately, that is not the world in which we live right now. I think legislative reform should dispense with antiquated presumptions about natural monopolies in the communications marketplace, and we should move away from industry-specific anticipatory regulation and instead treat communications companies like other businesses throughout the economy that are disciplined in the first instance by competition, not regulation.

Second, Congress should affirmatively require that the FCC account for actual competition among emergent substitutable offerings in a consistent way. The statute can't work properly without acknowledging that all the constituent parts of the broadband space, including web-based services and their implications for competition and consumers.

Third, Congress should consider structural inefficiencies that sometimes bring an already sluggish regulatory process to a screeching halt. In particular, we need to recognize that the multi-commissioner structure itself can breed interagency conflict and belabor decision-making.

Second, the FCC rarely produces timely decisions when measured against the pressing decisional demands of the internet era.

Third, the FCC asserts authorities that duplicate the work of other agencies, most notable in the context of reviewing mergers. Given the role played by expert antitrust agencies, there is no legitimate reason for the FCC to also assume responsibility for reviewing the competitive effects of a merger because the transaction happens to require a license transfer.

And finally, the well-intended Sunshine laws have the perverse effect of slowing the deliberative process by requiring things like open meetings any time more than two commissioners wish to discuss official business. Some of these are addressed in the discussion draft, and I think that is important.

But again, I come back to the premise that we need to reconsider the presumption of a monopoly that is written into both the '34 act and even the 1996 amendments that carried the same premise. Again, this isn't about any one commissioner or any one adminis-

tration. I think we really do need to reconsider the FCC's purpose and their role in a competitive, 21st Century environment so that we can be mindful and accomplish reform.

I certainly appreciate the opportunity to testify and look forward to answering your questions.

[The prepared statement of Mr. Sununu follows:]

TESTIMONY OF
JOHN SUNUNU, BROADBAND FOR AMERICA
BEFORE THE HOUSE ENERGY AND COMMERCE COMMITTEE, SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
JUNE 22, 2011

- I am here on behalf of Broadband for America, a coalition of more than 300 companies and organizations, including the nation's leading providers of broadband Internet access, equipment manufacturers, content and application providers, and consumer advocacy organizations.

- As you consider the process by which the Federal Communications Commission accomplishes its statutory duties, I don't want to miss the opportunity to call your attention to the more fundamental ways that the statutory framework that governs this marketplace is based on obsolete premises that do not match the realities of the marketplace.

- This burgeoning competition is a boon for American consumers, delivering extraordinary choice, lower prices, improved service, and a rapid innovation cycle. Broadband providers have invested more than $250 billion over the past three years in the effort to expand access to broadband technology.

- The net results include economic efficiency, job creation, export growth, and global competitiveness. America remains the locus of innovation, and America's growing and diverse broadband networks power that innovation.

- The Communications Act of 1934 is built on assumptions of natural monopoly that have conclusively been proven false in the context of broadband services. The challenge confronting lawmakers is to ensure that the underlying statutory framework is appropriately tailored to advance continued American leadership in this competitive and dynamic marketplace.

- It is time to move away from industry-specific, anticipatory regulation and instead treat communications companies like other businesses throughout the economy that are disciplined in the first instance by competition, not regulation.

- Congress should affirmatively require that the FCC account for actual competition among emergent, substitutable offerings in a consistent way.

- Congress should consider built-in structural inefficiencies that sometimes bring an already sluggish regulatory process to a screeching halt. I know that Chairman Walden's draft legislation focuses in particular on improving FCC process to address a variety of issues.
    - The FCC's multi-commissioner structure can breed intra-agency conflict and belabor decision-making.
    - The FCC rarely produces timely decisions when measured against the pressing decisional demands of the Internet era.
    - The FCC asserts authority that duplicates the work of other agencies, most notably in the context of reviewing mergers. Given the role played by the expert antitrust agencies, there is no legitimate reason for the FCC also to assume responsibility for reviewing the competitive effects of a merger because the transaction happens to require a license transfer.
    - The well-intended Sunshine laws have the perverse effect of slowing the deliberative process further by, for example, requiring an open meeting any time more than two commissioners wish to discuss official agency business.

- The FCC should place greater reliance on self-regulatory and multistakeholder organizational alternatives to the FCC's adversarial rulemaking processes.

TESTIMONY OF

JOHN SUNUNU, BROADBAND FOR AMERICA

BEFORE THE HOUSE ENERGY AND COMMERCE COMMITTEE, SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

JUNE 22, 2011

Good morning Chairman Walden, Ranking Member Eshoo, and the distinguished members of this subcommittee. Thank you for the opportunity to appear before you today.

I am here on behalf of Broadband for America, a coalition of more than 300 companies and organizations, including the nation's leading providers of broadband Internet access, equipment manufacturers, content and application providers, and consumer advocacy organizations. Our mission is to promote policies and programs that will make broadband Internet access available to every household in the nation and that will encourage the private-sector investments in broadband networks necessary to ensure the Internet is an economic, cultural, and societal driver of growth and prosperity.

As you consider the process by which the Federal Communications Commission accomplishes its statutory duties, we agree that it is important for consumers and providers alike to ensure a good decision making process by our government agencies. However, I don't want to miss the opportunity to call your attention to the more fundamental ways that the statutory framework that governs this marketplace is based on obsolete premises that do not match the realities of the marketplace.

I'm not alone in asserting that the mismatch between today's broadband marketplace and the prevailing legal framework requires a new way of thinking about telecommunication policy. Indeed, current FCC Chairman Genachowski said last week that "the statute is imperfect" and "it would make sense to update it." As President Obama pointed out in this year's State of the Union address, "we live

and do business in the Information Age, but the last major reorganization of the government happened in the age of black-and-white TV."

The time is ripe for fresh thinking and a modern approach. Accordingly, Broadband for America urges Congress to consider the realities of today's modern, highly competitive marketplace as it considers new statutory changes that will promote innovation and broadband investment. I'd like to first offer a few observations about the broadband marketplace and then provide some suggestions for reshaping both the framework and processes that govern the communications sector.

THE VIBRANT BROADBAND MARKETPLACE

Today's broadband networks now offer an array of services – voice, video, Internet access, and more – over multi-purpose, high-capacity digital connections. Broadband providers also collaborate with market participants across the Internet space – from software makers to device manufacturers – to offer services that can attract the attention of consumers in this very competitive environment. No one company or category of provider can do it all, and it is consumers demanding innovation and choice that ultimately drive the market. This burgeoning competition is a boon for American consumers, delivering extraordinary choice, lower prices, improved service, and a rapid innovation cycle. Consumers thus have unprecedented access to services and devices and the array of digital content at consumers' fingertips is essentially limitless. Broadband providers have invested more than $250 billion over the past three years in the effort to expand access to broadband technology. The net results include economic efficiency, job creation, export growth, and global competitiveness. America remains the locus of innovation, and America's growing and diverse broadband networks power that innovation.

Although the modern broadband communications marketplace is marked by burgeoning competition, breathtaking innovation, and constant change, the legislative framework that governs this marketplace is based on obsolete premises. The Communications Act of 1934 as well as the

Amendments of the 1996 Act were built on assumptions of natural monopoly that have conclusively been proven false in the context of broadband services. The challenge confronting lawmakers is to ensure that the underlying statutory framework is appropriately tailored to advance continued American leadership in this competitive and dynamic marketplace. And, while the current Commission is appropriately grappling with these very same issues, the Commission is obligated to enforce the Communications Act as it is today. While many of the procedural reforms discussed today are good ideas, the FCC would operate more effectively under a statute expressly designed for the Information Age.

A REGULATORY FRAMEWORK FOR THE INFORMATION AGE

Now, I'd like to offer a few thoughts on reform that go both to the process and substance of communications regulation. Several of these are rightly the focus of Chairman Walden's draft legislation on FCC reform.

First, it is time to move away from industry-specific, anticipatory regulation and instead treat communications companies like other businesses throughout the economy that are disciplined in the first instance by competition, not regulation. Accordingly, legislative reforms should dispense with antiquated presumptions about natural monopoly in the communications marketplace. The default presumption now should be that regulatory mandates are necessary only in the face of demonstrated market failures or when essential to advance important consumer protection goals in a narrowly tailored manner.

Second, Congress should affirmatively require that the FCC account for actual competition among emergent, substitutable offerings in a consistent way. The statute cannot work properly without acknowledging all constituent parts of the broadband ecosystem, including web-based services, and their implications for competition and consumers.

Third, Congress should consider built-in structural inefficiencies that sometimes bring an already sluggish regulatory process to a screeching halt. I know that Chairman Walden's draft legislation focuses in particular on improving FCC process to address a variety of issues.

- The FCC's multi-commissioner structure can breed intra-agency conflict and belabor decision-making.
- The FCC rarely produces timely decisions when measured against the pressing decisional demands of the Internet era.
- The FCC asserts authority that duplicates the work of other agencies, most notably in the context of reviewing mergers. Given the role played by the expert antitrust agencies, there is no legitimate reason for the FCC also to assume responsibility for reviewing the competitive effects of a merger because the transaction happens to require a license transfer.
- The well-intended Sunshine laws have the perverse effect of slowing the deliberative process further by, for example, requiring an open meeting any time more than two commissioners wish to discuss official agency business.

Finally, the FCC should place greater reliance on self-regulatory and multistakeholder organizational alternatives to the FCC's adversarial rulemaking processes. One of the great successes of the Internet is its largely self-governing nature, in which government plays a minimal role. It fosters innovation while at the same time achieving consistency. The Commission should be directed to foster and show deference to that successful model.

CONCLUSION

To be clear, our critique is of the regulatory framework, not of this or any other FCC. We have every indication that FCC Chairman Genachowski understands and is committed to the concept of reform at the FCC. That has also been true of his recent predecessors, all of whom have seen changes in the

communications industry unanticipated by the 1996 Act, let alone the 1934 Act, and have found the agency ill-equipped, at times, to respond. Only reconsideration by the Congress of the FCC's purpose and role in a competitive 21st century environment can accomplish true reform.

We appreciate the opportunity to share our views on these important issues. Broadband for America looks forward to working with Congress on these and other legislative initiatives to promote increased broadband deployment and utilization. Together, we can unleash additional investment and foster continuing innovation to the great benefit of the American people.

Mr. WALDEN. Thank you, Senator. We appreciate your being here as well. We thank you for your testimony. We will now turn to Ms. Kathleen Q. Abernathy, former Federal Communications Commissioner and now with Frontier Communications as chief legal officer and executive vice president for governmental affairs. You have worn many hats. We look forward to your testimony here, and thank you for participating.

STATEMENT OF KATHLEEN ABERNATHY

Ms. ABERNATHY. Thank you very much. Good morning Chairman Walden, Ranking Member Eshoo, and members of the subcommittee. It is truly a privilege and an honor to appear before you this morning to talk about what is very, very important—process reform at the FCC.

I am chief legal officer and executive VP of regulatory and government affairs for Frontier. We are the largest provider of broadband, voice, and video services to rural America. And as a wireline provider, Frontier is subject to regulatory oversight by the FCC and, just over this past year, we have engaged in a number of proceedings in front of the FCC, so we have current experience working with the current regulatory processes.

I am pleased to be here today to discuss your proposed reforms and some of the ways it might impact the FCC. My testimony is informed by my career in the telecommunications industry, and as you mentioned, that has included stints at the FCC, both as a commissioners, as well as legal advisor, as well as working in the general counsel's office. And with every position, I gained further insight into the processes that go on there.

In addition to this work in the public sector and, of course, my current position at Frontier, I have worked at law firms and in-house wireless, wireline, CLECs. This collective experience provides me with a unique perspective on how the FCC serves the public. I have experienced both the privilege and challenge of serving as a regulator, as well as the opportunity to work in the private sector. And the draft legislation proposes many reform actions that I think could make a major and significant improvement on the processes and I am pleased to talk about them today.

I made public statements during my tenure as an FCC commissioner and thereafter that relate to some of the proposed. For example, I have stated and I continue to believe that the Sunshine Act is overly restrictive in prohibiting communication among three or more commissioners outside of a public meeting. It is perverse, but it actually works contrary to the notion of an improved collaborative spirit, it discourages creative problem-solving, and it creates hurdles to timely and effective decision-making process. And I think if you do nothing else, if you reform that one rule, then these other concerns that you have would be immediately addressed because you would have an actual dialogue between the parties who are running the agency.

When it comes to transaction review and approval, Congress has conferred on the FCC a statutory obligation to review license transfers and to either reject, approve, or if necessary approve it with conditions. And these conditions should be designed to ensure that the transaction at issue complies with the Commission's rules, as

well as being consistent with the public interest. As a commissioner, I always believed that the Commission owed it to the parties to act promptly on license transfers—there is a lot of cost associated with the delays in transfers—and to impose conditions when necessary to address merger-specific harm that impact the public interest.

Merger reviews shouldn't be seen by third parties as an opportunity to impose obligations unrelated to the mergers, especially if it has the unintended consequence of advantaging or disadvantaging a company as compared to its competitors. My belief is that general obligations not designed to address merger-specific harm, there is a vehicle for that. You should consider and review them in the context of rulemaking process, and that is subject to notice and comment.

I have also noted before that I think there is a time and place for timelines and shot clocks. It is difficult to implement a uniform timeline for all proceedings. For example, with a particularly complex process, the FCC has to do a complex balancing between moving expeditiously to adopt a timely decision, as well as gathering the data necessary. But shot clocks are very, very beneficial because it is an action-forcing event. And the challenge with the numerous issues in front of the FCC and with the statute that many would agree is somewhat outdated is that these issues are very, very difficult. There is many times no good answer. And when there is no good answer, you sometimes don't work ahead to a resolution. You kind of kick the can down the road because you are very frustrated. A shot clock would force you to just sort of address that issue and try and resolve it.

I applaud Chairman Walden and the subcommittee for focusing on FCC process reform. Process and procedure—just as much as substance itself—have a direct impact on industry participants and consumers. And given the critical role of telecommunications in our daily lives and our global competitiveness, it is appropriate for Congress to consider updating and improving the framework for the FCC's deliberative process.

Thank you for having this important discussion and I look forward to your comments and questions.

[The prepared statement of Ms. Abernathy follows:]

TESTIMONY OF KATHLEEN Q. ABERNATHY
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
"REFORMING FCC PROCESS"
*****
JUNE 22, 2011

Good morning Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee. It is a privilege to appear before you this morning.

I am Chief Legal Officer and Executive Vice President of Frontier Communications, the largest provider of broadband, voice and video services focused on rural America. As a wireline incumbent telecommunications service provider, Frontier is subject to regulatory oversight by the FCC and, just over the past year, has commented in proceedings and met with FCC Commissioners and staff on issues ranging from transaction review to open Internet regulation to Universal Service Fund reform.

But, I believe I have been asked here today to serve as a resource based on my experience at the FCC. My career in the telecommunications industry has included positions as Legal Advisor to two FCC Commissioners, Special Assistant to the Agency's General Counsel, and then as an FCC Commissioner from 2001 to 2005.

In addition to my work in the public sector and my current position at Frontier Communications, I have worked at law firms and in-house representing various telecommunications industry stakeholders – including incumbent local exchange carriers, competitive local exchange carriers, Internet service providers, and wireless telephone providers – before the FCC.

My collective experience has provided me with a unique perspective on how the FCC serves the public. I have experienced the privilege and challenge of serving as a regulator, and

have had the opportunity to serve outside as an advocate for industry participants. The draft legislation proposes many reform actions, and I am happy to comment in my capacity as a former FCC Commissioner, as an industry representative, or both.

While I do not take a position on the discussion draft or come here today to suggest specific FCC process reforms, I have made public statements during my tenure as FCC Commissioner and thereafter that relate to some of the proposed legislative reforms. For example, I have stated before and continue to believe that the Sunshine Act is overly restrictive in prohibiting communication among three or more commissioners outside of a public meeting. The prohibition actually works contrary to the notion of collaborative spirit, discourages creative problem solving, and creates hurdles to a timely and effective decision-making process.

When it comes to transaction review and approval, Congress has conferred on the FCC a statutory obligation to review license transfers and to reject the transfer, approve it, or if necessary approve it with conditions necessary to ensure that the transaction at issue complies with the Commission's rules and is consistent with the public interest. As a Commissioner, I always believed that the Commission owed it to the parties to act promptly on license transfers and to impose conditions only when necessary to address merger-specific harms. Merger reviews should not be seen by third parties as an opportunity to impose obligations unrelated to the merger, especially given that, by definition, competitors will remain free from those obligations. My belief is that general obligations not designed to remedy merger-specific harms should be considered and reviewed by the FCC in the context of the rulemaking process, subject to notice, comment, and judicial review.

I have also noted before that there may be a time and place for timelines and shot clocks to encourage Commission action. But it is difficult to implement a uniform timeline for all

proceedings. For example, with particularly complex issues, the FCC must conduct a careful balancing act between moving expeditiously to adopt a timely decision and gathering data necessary to make the right decision.

The issues addressed in the proposed legislation are complex. I applaud Chairman Walden for focusing on FCC process reform. Process and procedure – just as much as the substance itself – have a direct impact on industry participants and consumers. Given the critical role of telecommunications in our daily lives and our global competitiveness, it is appropriate for Congress to consider updating and improving the framework for the FCC's deliberative process. Thank you for having this important discussion. I look forward to your comments and questions.

Mr. WALDEN. Ms. Abernathy, thank you. We appreciate your counsel.

Now, we are going to hear from Brad Ramsey, who is the general counsel for the National Association of Regulatory Utility Commissioners. And thank you for being here. We look forward to your testimony as well.

STATEMENT OF BRAD RAMSAY

Mr. RAMSAY. Thank you, sir. And Chairman Walden and Ranking Member Eshoo and other members of the panel, I really appreciate the opportunity to testify today, and I commend Mr. Walden and the rest of you for holding this hearing.

I represent NARUC, as Mr. Walden pointed out. I have been there 20 years. NARUC, for those of you that don't know, is the group that represents all of the stake public service commissions that oversee telecommunications, energy, and other utilities in your jurisdictions. If you want to know what the potential impact of these process reforms are for state commissions, you know, protecting your constituents in state-specific preemption, pleadings that get filed at the FCC, and in the broader universal service and inter-compensation reform items that they consider from year to year, you want to talk to your state commission. They will tell you what the impact is in terms of their opportunity to protect the citizens of your individual States. And I am happy for those of you—and I don't see very many in this room that I don't think I already know their state commissioners. But if you don't know your state commissioners, I am happy to provide a gateway for you.

What is the hearing about today from my perspective? Well, I don't think there is any question that reform is needed, and I also don't think that there is any question that a number of the proposals included in this discussion draft will definitively improve transparency at the FCC and will definitely improve the ability to create a better record for decision-making at the FCC.

NARUC has a technical position on every section, but we have been pushing some of these reforms for over 10 years. The draft that came out, I think it is an excellent starting point for a bipartisan bill that could pass in this Congress. So for me, this hearing, this draft is all about opportunity. You have an opportunity to finally correct the stilted application of Sunshine laws that does nothing but shed additional light on agency procedures. And all it does—and I know this from personal experience—is muck things up and slow things down. You have an opportunity. There are actually two or three provisions that make sure that everybody gets a realistic opportunity to comment on what the Agency is actually going to do, not just the people that have the most money, not just the people that have the most staff resources.

You have an opportunity here to formally adopt some of the highly lauded—Ms. Eshoo mentioned the fact that the Commission deserves a lot of credit for a lot of the transparency measures that they have put into place. There were a couple measures that came in the last administration. I agree. You have an opportunity here to lock those into law and make sure that future commissions do not discard them.

You also have an opportunity to normalize expectations. This is a shot clock idea that is in the bill. I actually think that that is wonderful idea. The Agency gets to set the approximate time frame that they want to shoot for. And this is much better than an item languishing there for 10 years, or, in my case, and I end up languishing there for 5 or 6 years, and the next time I hear about it from the Agency is they are putting a notice out that says, you know, we would like to terminate your proceeding because the record is stale. A shot clock gives them something to shoot at. It is a good idea.

But perhaps the most important opportunity that is presented in this item are the pieces that help the Agency build a better record upon which to base its decision. The decision can only be as good as the record that they are basing their decision upon. If you shortchange the decision, if you shortchange the process, you are shortchanging the American people. It is one of the reasons why when we are talking about, great, we are finally going to have some definitive deadlines or a minimum deadline that allows the state commissions who have this complicated process of perusing comments to actually file comments. But another good part of this bill is it says you are going to put the text of the dadgum rule out so that I actually know what to write my comments about. NARUC has endorsed that for some time. I commend the current chairman for doing it 85 percent of the time. I don't understand why it can't be done 100 percent of the time.

You have ensured an opportunity here to make a real difference in the FCC decision-making process. It is long overdue. It is an opportunity that can only make better decisions come out of the—it is not going to make the process perfect, but it is going to make the decisions better, which can only benefit your constituents. The consumers across the country and the industry as a whole, it is an opportunity I hope you take.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Ramsay follows:]

SUMMARY OF THE TESTIMONY OF NARUC GENERAL COUNSEL BRAD RAMSAY ON FCC REFORM BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES ENERGY AND COMMERCE COMMITTEE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

June 22, 2011

The *Discussion Draft* provides an excellent starting point for a bipartisan bill that could and should pass in this Congress.

There is no question that reform is needed and long overdue. There is also no question the circulated draft includes process reforms that will increase transparency, permit broader participation by resource-constrained stakeholders, and guarantee a better record for FCC decisions.

NARUC has not taken a position on several elements in the legislation, but we have specifically endorsed provisions that allow full participation by all parties on an equal footing and (1) require the FCC to seek comment on specific rules before taking final action, (2) require at least 30 days for stakeholders to comment on a proposal or comment, and (3) assure the FCC cannot rely on an ex parte/report proposal in any final rule unless it was put out for comment. Combined, these requirements assure the FCC cannot act without providing a real opportunity for some testing or critique of the evidentiary basis for proposed orders.

We have no position on Section 5A(a)'s three analytic constructs for burdensome rulemakings, but our testimony concedes that, at a minimum, some type of weighing of the relative costs and benefits is the *sine qua non* of both agency oversight and reasoned decision making

The innovations proposed in Sections 5A (b), (c) and (d), all cover necessary pre-requisites for efficient Commissioner-to-Commissioner interactions. No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that support them. These sections make sure these essential access prerequisites occur.

Section 5A (c) addresses the ridiculous inefficiencies imposed on Commission (and Joint Board) deliberations caused by a rigid application of the Sunshine law. NARUC has endorsed some aspect of these changes since 2004. As currently applied, they do not advance the public interest – instead they simply put more authority in the hands of expert staff and drag out the negotiation process.

Sections 5A (f), (g), (h) and (i) all are laudable procedural vehicles to (1) assure that orders do not languish and (2) allow all stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has specifically endorsed many of these suggestions – including the idea of setting deadlines for the conclusion of all types of proceedings and releasing orders shortly after they are is approved. But the *Draft* goes further. It also includes provisions that ratchet up pressure for the FCC to meet those deadlines - requirements to report to Congress on FCC track record on deadlines as well as the associated requirements to continue providing all parties with the current status of all items currently on circulation at the agency for a vote.

NARUC and its members are committed to working with you to improve the FCC's process. We look forward to future opportunities to provide input on these issues. Please do not hesitate to contact me, Brad Ramsay (898.2207) or NARUC's Legislative Director for Telecommunications, Brian O'Hara (898.2205) if you have any questions about NARUC's position on this draft.

Testimony on behalf of the
National Association of Regulatory Utility Commissioners
(NARUC)

by

James Bradford Ramsay
NARUC GENERAL COUNSEL

before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

hearing on

Reforming Federal Communications Commission Process

June 22, 2011

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Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, thank you for the opportunity to testify today on Federal Communications Commission (FCC) Process Reform.

I am Brad Ramsay, the General Counsel of the National Association of Regulatory Utility Commissioners (NARUC). It is – like Congress – a bipartisan organization. NARUC's members include public utility commissioners in all your States, the District of Columbia and U.S. territories with jurisdiction over telecommunications, electricity, natural gas, water and other utilities. The people I represent are the in-State experts on the impact of FCC regulation in your State and on your constituents. They, like you, worry about the impact of FCC initiatives on your constituents. I have spent the last 20 plus years representing NARUC on, among other things, telecommunications issues. I spend a great deal of time at the FCC. I am staff to every joint board and conference and support several NARUC commissioners serving on several FCC federal advisory committees.

Let me begin by sincerely thanking you for circulating the *Discussion Draft* and holding this hearing. There is no question that reform is needed. There is no question this draft includes process reforms that will significantly increase transparency and guarantee the FCC compiles a better record for decisions. NARUC has already specifically endorsed several of the changes suggested in the *Draft*. We have not however, taken positions on every section. Moreover, there are a few simple needed reforms NARUC supports that are not included. Nonetheless, the *Draft* provides an excellent starting point for a bipartisan bill that could pass in this Congress.

NARUC will help any way we can.

As one respected law professor put it in 2009:

> For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of … how to reform the FCC's institutional processes.[1]

Most would agree that the agency has made considerable progress since that time, but several of the organic changes the *Draft* proposes to the FCC's enabling statute will assure there is no backsliding and other changes further improve the agency's procedures.

Even if Congress is only able to pass the provisions NARUC has specifically endorsed, that alone will result in a more transparent and efficient process, and ultimately better and more informed decisions more likely to survive judicial review. That, in turn, can only result in better oversight, more competition, and new and improved services and service quality for consumers.

NARUC has well-established positions on several of the proposals. This testimony attempts to take them in the order they appear in the *Draft*.

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[1] See, Weiser, Philip J., *FCC Reform and the Future of Telecommunications Policy,* at 1, (January 5, 2009), ("*FCC Reform*") at: http://fcc-reform.org/f/fccref/weiser-20090105.pdf. Professor Weiser was tapped by the Administration to work on, *inter alia*, smart grid policy for the White House. Recently, he left the White House to return to the University of Colorado as its dean. Cf. Abernathy, Kathleen, *Managing the FCC: Style, Substance, and Institutional Reform* (January 5, 2009) available online at: http://fcc-reform.org/response/managing-fcc-style-substance-and-institutional-reform and Marcus, Michael, *Comments on Weiser's "FCC Reform and the Future of Telecommunications Policy"*, at: http://fcc-reform.org/response/comments-and-observations-weisers-fcc-reform-and-future-telecommunications-policy

PROPOSED RULE MAKING REQUIREMENTS[2]

Many agency observers, including NARUC,[3] have long recognized the problems with the FCC's rulemakings. Professor Weiser, in the earlier cited *FCC Reform* article, at 16-17, explained the problem this way:

> In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include "a description of the subjects or issues involved."[] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation. {footnote omitted}

Section 5A(a) suggests the correct solution to this problem, one specifically endorsed by NARUC as early as 2008, that the FCC must seek comment on the specific language of the proposed rule or modification.

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[2] Congress may wish to consider, in this context, that the FCC often issues orders in non-rulemaking proceedings that have broad applicability. The agency's rules recognize the fairness issues – and the opportunities for creating a better record for decisions in a note to 47 C.F.R. § 1.1208 stating: in such cases "the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings."

[3] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6, available online at: http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf. ("Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This ***revives*** an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. *The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions*.")

This, in turn, logically requires there also be "certain prior" proceedings.[4]

Significantly, the section also requires a minimum of 30 days for stakeholders to comment on a proposal and 30 days to reply to others comments. Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process - an improvement that insures the FCC has a more complete record prior to making a decision. Indeed, often NARUC's State member commissions – *who frequently are among the best positioned to provide useful and relevant input* - cannot get comments drafted and approved in time to make shorter deadlines. By establishing a minimum 30 day comment time frame, Congress would be tilting the FCC process in favor of better and more complete records as a basis for FCC decisions. Shortchanging the development of the record can only lead to less informed decisions.

Statutory deadlines make it easier to plan comment cycles. The only time problems might arise is when the FCC wishes to base its decision on some late filed submission or report – which because of a looming statutory deadline has not been subject to in-depth critiques by other interested stakeholders.

This is not a hypothetical concern. In several forbearance proceedings, petitioners filed data that purportedly supported their petitions very close to the statutory deadline. Such action effectively eliminated the opportunity for any opposition or real analysis.

Indeed, NARUC passed a resolution in 2008 seeking revisions to the FCC's existing forbearance procedures to assure that States have a realistic opportunity to

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[4] NARUC has not taken a position on whether performance measures should be included in any final rulemaking that imposes a burden on consumers or industry – but, on its face, such a proposal would require the agency to focus on the actual impact of any proposed rule and determine if it is likely to have a beneficial impact.

participate and comment on data provided in such circumstances.[5] The FCC arguably handled the issue in that proceeding. However, the *Discussion Draft* eliminates this concern prospectively vis-à-vis any other deadlines by requiring, in a subsequent section - Section 5A (e) - that the FCC cannot "rely, in any order, decision, report, or action, on— (1) a statistical report or report to Congress, unless the Commission has made such report available for comment for 30-days period prior to adoption or (2) an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing."

Emergencies do, however, arise where there is no time for either extended notice or comments. The FCC should retain some authority to act in exigent circumstances.[6]

Finally, Section 5A(a) requires for rules that impose a burden or costs - that the FCC do three things (1) identify and analyze "the market failure and actual harm to consumers that the adoption, modification, or deletion will prevent," (2) conduct "a cost-benefit analysis of the adopted rule or the modification or deletion of an existing rule; and (3) include "performance measures for evaluating the effectiveness of the adopted rule or the modification or deletion of an existing rule."

NARUC has not taken any position on these three interrelated analytical requirements. However, all regulations impose some costs,[7] and some type of weighing

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[5] To address this problem, NARUC asked the FCC to require forbearance petitioners to file "complete" petitions before the statutory shot clock starts to help ensure that all parties have a fair opportunity to thoroughly review and present their views to the Commission. On August 6, 2009, the FCC did so.

[6] Presumably the FCC would retain the authority in 5 U.S.C. § 553(b)(3)(B) to omit notice and public procedures "when the agency for good cause finds" it is "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. § 553(b)(3)(B), online at: http://www.archives.gov/federal-register/laws/administrative-procedure/553.html. But some clarification might be useful.

of the relative costs and benefits is the *sine qua non* of both agency oversight and reasoned decision making. Such an approach, has been supported by all of our recent Presidents via various Executive Orders[8] the most recent released by the current Administration last January.[9]

It is never a simple task to complete such an analysis. Most of the costs and benefits come during and after the rule is adopted – which necessarily allows only imprecise, speculative measurement.

Still, logically, an analysis of a rule's potential benefits and costs, as well as milestones for its review, could focus available resources and expertise on the efficacy of any proposed rule.

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[7] On April 1, 2011, the Office of Management and Budget announced its 14th annual Report to Congress on the Benefits and Costs of Federal Regulations at 76 Federal Register 18260 (April 1, 2011) - online at: http://edocket.access.gpo.gov/2011/pdf/2011-7504.pdf. The document does a cost-benefits analysis and claims regulatory benefits between $136 and $651 billion and total costs of $44 to $62 billion. A draft of the report is available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/. Other estimates of the cost side are higher. See, e.g., *The Impact of Regulatory Costs on Small Firms* by Nicole V. Crain and W. Mark Crain Lafayette College Easton, PA (September 2010) developed under a contract with the Small Business Administration, Office of Advocacy, available online at: http://archive.sba.gov/advo/research/rs371tot.pdf , which claims the annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008.

[8] See, e.g., Executive Order No. 12291, 3 C.F.R. 127 (1982) (Reagan's executive order requiring the benefits of regulation to outweigh the costs); Executive Order No. 12498, 50 C.F.R. 1036 (1985) (Reagan's executive order requiring OMB review of all new regulations); Exec. Order No. 12866, 3 C.F.R. 638 (1994)(Clinton's executive order requiring regulatory review and agency determination that regulatory benefits justify its costs). President George W. Bush issued Executive Order 13,422, 72 Federal Register 2763 (January 23, 2007) amending Executive Order 12,866, which, *inter alia*, required agencies to "identify in writing the specific market failure (such as externalities, market power, or lack of information) or other specific problem that it intends to address..to enable assessment of whether any new regulation is warranted."), available online at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.

[9] See, Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011) , published at 76 Federal Register 3821 (January 21, 2011), (Obama's order specifically notes "each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives. . ."). This order is also available online at: http://edocket.access.gpo.gov/2011/pdf/2011-1385.pdf.

COMMISSIONER COLLABORATION

The next three sections of the *Discussion Draft*, Sections 5A (b), (c) and (d), all cover necessary pre-requisites for efficient Commissioner interactions.

Section 5A (b) contains a series of measures that assure the Chairman of the agency cannot disadvantage or withhold critical information from his/her fellow commissioners. NARUC has specifically endorsed giving FCC Commissioners a minimum of 30 days to review the record of a proposed rulemaking or order. This is consistent with the *Draft's* twin requirements to assure all FCC Commissioners have adequate time to review a proposed rulemaking, including the actual text of a draft order, as well as knowledge of options available to resolve a particular proceeding.

No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that supports them. This *should* not be an issue. However, whether accurately or not, the Chairs of the FCC,[10] as well as other agencies,[11] have – from time to time – been accused of using process to limit information about particular proceedings and/or otherwise prevent other commissioners from effectively fulfilling their statutory responsibilities. The Section 5A(b) requirements should diminish these concerns.

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[10] See, e.g., *Committee on Energy and Commerce Majority Staff Report, Deception and Distrust: The Federal Communications Commission Under Chairman Martin* (December 2008).

[11] Compare, e.g., *Memorandum to NRC Chairman Jaczko from Hubert T. Bell, NRC Inspector General on the NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository Lincense Application* (OIG Case No. 11-05) (June 6, 2011), addressing, *inter alia*, concerns about whether the Chairman's "control of information prevents the other commissioners from effectively fulfilling their statutory responsibility to address policy matters."

Section 5A (c) is a modified version of standalone bipartisan legislation sponsored by Representatives Eshoo, Shimkus and Doyle - the *FCC Collaboration Act (H.R. 1009)*. This section of the *Draft* corrects systemic problems with the so-called "Sunshine laws" that induce significant inefficiencies and delay in FCC administrative process. NARUC has already publicly endorsed H.R. 1009 (with one modification) and has supported some of the concepts incorporated in this section of the *Draft* since 2004.[12]

In a December 12, 2008 Letter to the current Administration's Transition Team,[13] NARUC urged the Administration to press for substantial and broad modification of the so-called Sunshine rules that are the focus of this section. Specifically, there, among a laundry list of other much needed FCC reforms, NARUC argued:

> Efficiency – Sunshine Rules: *Drop the Artifice and require face-to-face Commissioner Negotiations . . . lift the sunshine rules for face-to-face FCC commissioner negotiations.* The current "Sunshine rules" do not prevent decisions from being made out of the sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient.

As long as any formal vote occurs in an open meeting, the *Discussion Draft* allows negotiations among principals (the FCC Commissioners) – not just their delegates. This is a significant and much needed improvement to the current process and we support it. But this *Draft* also deftly handles a related problem that arises in the context of Joint Board deliberations.

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[12] See *Resolution on Federal Restrictions Affecting FCC Commissioner Participation on Joint Boards* (March 10, 2004), at: http://www.naruc.org/Resolutions/participation_jointboards04.pdf.

[13] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

To take advantage of the expertise and insight of State Commissioners on certain key issues, Congress requires joint FCC-State deliberative bodies. These so-called "joint boards", charged by Congress with the responsibilities of a federal administrative law judge and tasked with making critical record-based recommendations on universal service,[14] advanced services,[15] and separations[16] issues, *also have FCC Commissioners as participants*. Necessarily, the incredible inefficiencies in deliberations imposed by the current law on full commission deliberations also plague the work of these Congressionally-mandated bodies. A typical joint board has four State public service Commissioners, nominated by NARUC and confirmed by the FCC, and three FCC Commissioners.

Currently, FCC Commissioners must rotate their participation during face-to-face meetings and conference calls of such Joint Boards, causing continuous inefficient repetition of prior conversations and positions. This is another area where there is bipartisan consensus that the Statute should be changed. At your last FCC oversight hearing the *Draft's* proposed sunshine amendments - particularly with respect to Joint

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[14] The FCC Federal State Joint Board on Universal Service was established in March 1996 as per the Congressional mandate found in 47 U.S.C. § 254 (1996) (The text of the law is available from the Government Printing Office website at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+47USC254. The FCC webpage on this Board is at: http://www.fcc.gov/wcb/tapd/universal_service/JointBoard/welcome.html.

[15] The FCC Federal State Joint Conference on Advanced Services was established in 1999 as part of the FCC's effort to promote deployment of high speed services, pursuant to 47 U.S.C. § 157 (Note incorporates § 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended by Pub. L. 107-110, Title X, § 1076(GG), Jan.8, 2002, 115 Stat. 2093), available at page 32 of the 2007 House edition of Title 47 of the United States Code, online at: http://uscode.house.gov/pdf/2007/2007usc47.pdf. The FCC webpage on Joint Conference on Advanced Services activity is at: http://www.fcc.gov/jointconference/headlines.html. Congress authorized its creation in 47 U.S.C. § 410(b) (1994), found online at page 220 of Title 47 referenced *supra*.

[16] The FCC Federal State Joint Board on Separations has been in operation for over 25 years. Congress authorized its creation in the 1970s in 47 U.S.C. § 410(c) (1994), found at page 220 of the copy of Title 47 found at the web address in note 3, *supra*. The FCC webpage on the Separations Joint Boards is at: http://www.fcc.gov/wcb/tapd/sep/welcome.html.

Boards and Conferences, was the focus of Commissioner Clyburn's testimony, endorsed by the other FCC Commissioners and discussed at length during the question and answer period.[17] Sunshine reform – either as a standalone measure or part of a broader proposal like this *Discussion Draft* is long overdue. This section unquestionably streamlines the FCC's decisional procedures. Its requirement for party diversity for a quorum to meet is a critical and clever additional protection of process. NARUC urges Congress to move quickly to reform this aspect of Commission operations.

Section 5A (d) of the *Draft* requires the FCC to establish specific procedures for how the FCC will handle the circumstance where the Chairman is not in the majority on a proposed decision. This circumstance does occur from time to time. During Chairman Powell's stewardship of the agency, three FCC Commissioners combined to override his proposed so-called Triennial Review Order. Chairman Powell, of course, allowed the majority to direct the staff to draft the decision for review by the full Commission. NARUC supported that process.

Having rules in place for exactly how this process will work in the future will not only streamline the drafting process the next time it occurs, it also should be welcomed by FCC staff as a clear guide for their fiduciary responsibilities in such circumstances.

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[17] Testimony of FCC Commissioner Mignon Clyburn before the House Subcommittee on Communications and Technology, (May 13, 2011), available online at: http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Clyburn.pdf

Transparency and Assuring FCC Action in Pending Proceedings

The next four sections – (f), (g) (h) and (i) all are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has, again, specifically endorsed many of these suggestions.

Indeed, in the earlier referenced December 2008 letter to this Administration's Transition team, NARUC specified that:

> The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to "act" on USF Joint Board recommended decisions within one year.

Setting some deadlines for each type of proceeding by rule is a good idea – as the *Draft* specifies in Section 5A(g). But the *Draft* goes further. It also includes provisions that ratchet up pressure for the FCC to meet those deadlines. This includes the requirements in Section 5A(i) to report to Congress on the FCC's success with meeting deadlines as well as the associated requirements in Section 5A (f) for public reports to show the current status of all items on circulation. NARUC also specifically endorsed this last requirement because it not only puts pressure on the FCC to act on circulated items, but it also "gives interested parties notice that some action in a particular docket is imminent."[18]

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[18] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

NARUC also specifically endorsed requiring the FCC to release decisions within a set time after the last Commissioner votes on the item. We did, however, suggest a slightly longer time frame – 30 days.

I have, as requested, focused this testimony on the *Discussion Draft* and referenced NARUC's explicit support for a number of provisions and its implied support for others. There are, however, in NARUC's view, other issues Congress should address as part of any reform proposal. One of the more obvious is embodied in the recently introduced bipartisan *FCC Commissioners' Technical Resource Enhancement Act* (H.R. 2102). The bill allows each FCC Commissioner to appoint to its staff an engineer or computer science professional to provide expert counsel on technical matters before the agency. NARUC passed a resolution on this precise point in February 2009, which, among other things, points out that proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering.

NARUC and its members are committed to working with you to improve process and procedure at the FCC. We look forward to future opportunities to provide input on these issues. Please do not hesitate to contact me or NARUC's Legislative Director for Telecommunications, Brian O'Hara if you have any questions about NARUC's position on this draft.

Mr. WALDEN. Thank you, Mr. Ramsay. We appreciate your testimony and we look forward to offering up some questions.

We go now to Dr. Mark Cooper, Research Director at Consumer Federation of America. Dr. Cooper, we are delighted you are with us today and we look forward to your comments.

STATEMENT OF MARK COOPER

Mr. COOPER. Thank you, Mr. Chairman, members of the committee.

In the past 30 years, I have seen the good and bad of regulation up close and personal. In 300 appearances as an expert witness on behalf of public interest groups in 50 jurisdictions in the United States and Canada, Brad represents NARUC. I have testified before 95 percent of the NARUC members.

In my testimony, I outline areas where the regulatory process at the Federal Communications Commission should be improved. We need reform of the ex parte communications. We need greater reliance on independent and peer reviewed research. We need to provide notice on the specific details of rules to afford the public the opportunity to comment on those rules. We should enhance public participation in rulemaking process by use of multi-stakeholder groups, regulatory negotiations, and participatory enforcement. Other agencies do it. The FCC should get with that kind of program to expand input from the public and the industry in a formal way rather than the backdoor way of the current ex parte process.

The discussion draft, however, causes me great concern. I look at the center of the Communications Act as the public interest standard, which is a principle on which it stands. And the language that imposes a harm-based standard I believe will undermine the ability of the FCC to protect the consumer and promote the public interest.

The word "harm" occurs exactly twice in the statute, both times in a section that worries about incumbent local exchange carriers who could abuse information service providers. The words "public interest" occur 103 times. That is the standard at the center of the act.

Now, others will tell you why the Agency does not have to adhere to the executive branch order on cost-benefit analysis. Let me explain to you why it should not. A harm-based standard is inadequate to protect the public interest in the communications sector for several reasons. First, a substantial part of the Communication Act involves noneconomic democratic values of access to communication and freedom of speech, which are virtually impossible to evaluate in now-economic terms. The antitrust laws do not do democracy.

Second, universal service is a critical goal of the Communications Act that is non-amenable to a narrow cost-benefit analysis. The value of connecting households to a network is an externality that is difficult to measure but extremely important as a political, social, and economic accomplishment. No other agency does universal service.

Third, consumer privacy, over which the FCC has a significant authority in proprietary network information, is not readily amenable to a harms standard.

Fourth, in a dynamic network industry, a public interest approach is much more appropriate for interconnection and nondiscriminatory carriage. Under a harms standard, it would have been impossible to value the Carterphone decision, the Computer Inquiries, or the 802.11 WiFi rules, which were forward-looking and are key elements of creating the rich communication environment we have today. This is an industry with massive positive externalities.

I believe this criticism also applies with equal force to the merger review. Mergers create unique challenges to the public interest that are best dealt with during the merger review process. The problem in contemporary markets like telecommunications is not too much regulation but too little competition. However, the lack of competition is not the result of nefarious business practices or lacks antitrust enforcement.

These industries, so strong economies of scale and scope, which mean that very few competitors can achieve minimum efficient scale, they show strong economies of demand side known at network effects, which make them winner-take-most industries. The challenge in these industries is small numbers providing critical infrastructure and platforms that support massive amounts of other activity. The challenge is to make sure that they are profitable and innovative but check their tendency to use vertical leverage or market power to undermine competition. That is a very, very difficult proposition to evaluate with a narrow harm-based standard. That is a proposition that is easy to address in a merger, which creates the very problem of vertical leverage. That is what we have suffered in this industry.

As always, I look forward to working with the committee to develop any legislation that is needed. I urge you to take the attack on the public interest standard out and focus on those areas where the Commission does not have the ability to act on its own. Most of the changes that we need in process can be done internally. Establish the norms for transparent, swift-enforced regulation, and once those norms are established, it will be difficult for future commissions to abandon them. The Commission should do what it can. This committee should help it where it can.

[The prepared statement of Mr. Cooper follows:]

Consumer Federation of America
1620 I Street NW Suite 200 * Washington, DC 20006

TESTIMONY OF DR. MARK N. COOPER
DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

ON

REFORMING FCC PROCESS
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATED HOUSE OF REPRESENTATIVES

JUNE 22, 2011

Mr. Chairman and Members of the Committee,

My name is Dr. Mark Cooper. I am Director of Research at the Consumer Federation of America (CFA) is a federation of approximately 300 state and local organizations formed to represent the consumer interest in national policymaking. In its role as an educational and advocacy group, CFA has participated in thousands of regulatory proceedings in its 40 year history. In the past 30 years I have testified on behalf of public interest groups over 300 times in fifty jurisdictions in the U.S. and Canada. I have responsibility for telecommunications policy at CFA and about two-thirds of my testimony has dealt with telecommunications policy. I have seen the good and bad of regulation up close and personal.

The record will show that I have supported regulatory reform for decades and that I believe the Federal Communications Commission (FCC) is in desperate need of reform. However, I believe that, if adopted, the Discussion Draft would do severe harm to the ability of the Commission to protect consumers and promote the public interest, while it does little to improve the regulatory process at the FCC.

- On substance, it undermines the core public interest principles of the Communications Act that govern rulemaking and merger review, superimposing a narrow "harm" based standard that would limit the ability of the FCC to protect consumers and promote the public interest.

- On process, it fails to address the fundamental flaws that have allowed industry to dominate the Commission, while it heaps reporting requirements on the Commission that will do little to improve the administrative process.

AGENCY ACTION TO IMPROVE REGULATION

There are many steps the FCC can take on its own to improve the regulatory process and, presumably, the outcomes. Most of the reforms needed do not require legislation; they are well within the administrative authority of the agency to clean up its act. After the FCC has done all that it can to improve its regulatory process, internally, if the agency or the

Congress can point to meaningful and necessary process changes that are beyond the power of the agency, narrowly targeted process changes could be considered.

***Ex parte* Communications:** The *ex parte* process at the FCC is an abomination. It has become an unofficial and abusive backdoor process of negotiation in which access to the offices of the Commissioners is the most prized asset. The FCC should reform the process in two ways. First, all *ex parte* meetings should be transcribed by third parties. Second, any rules that rely significantly on *ex parte* information should be published for Further Notice to afford a more equitable opportunity to participate. The FCC needs to dramatically reduce its reliance on *ex parte* communications by relying more on independent research. However, it must reform the process by which the research topics are selected and the resources awarded. The selection of topics and researchers needs to be more transparent, perhaps through the better use of advisory committees and joint boards. Formal RFP procedures should be followed and the FCC should adhere strictly to the Data Quality Act procedures on peer review of important scientific information. Once the Commission establishes new norms, it will be difficult for future Commissions to revert to past bad practices.

Notice and Comment: I share the concern expressed in the Discussion Draft with the failure of the FCC to afford the public the opportunity to comment on real proposed rules. Too often a notice of proposed rulemaking presents vague ideas and tentative conclusions without any rules actually proposed. The public should be afforded a full opportunity to comment on specific rules. This is especially true if the proposed rule relies on *ex parte* communications. It should also apply to merger conditions. However, Congress will have difficulty legislating the specificity necessary to meet a new standard, which will trigger a round of litigation specific to the FCC. The underlying problem lies in the Administrative Procedure Act, rather than the Communications Act. The FCC can correct the problem voluntarily by putting fully formed proposed rules out for comment and establishing the norm that this is the expected behavior.

Setting the Agenda: The Discussion Draft seeks to check the power of the Chairman by prescribing periods for the circulation of internal documents and empowering members of the Commission to force issues onto the agenda. A more effective way to reform the agenda setting process is to encourage input from stakeholders in a transparent manner. If the agency needs greater input from the stakeholders in the regulatory process, the agency should encourage regulatory negotiations as an alternative to *ex parte* communications. If the statute does not allow, it should be amended to do so.

I arrive at these conclusions based on the following regulatory and historical analysis.

REGULATION AND REGULATORY REFORM

Regulation should be evaluated at both the level of substance and process and regulatory reform is about making regulation work better. Regulation involves three very

different actions – goal setting, rule writing and day-to-day implementation. Good regulation has clarity of purpose, transparency of process and certainty of enforcement.

- Regulation is effective when it accomplishes the goals for which it was adopted.
- Regulation is equitable when the process by which the rules are adopted and the substance of the rules treat the people who are governed by the rules – both the producers and the consumers – fairly.
- Regulation is efficient when it consumes the minimum amount of resources necessary to ensure that rules are effective.

Most discussions of regulatory reform these days focus on ways to make regulation more business-friendly by giving producers more influence and flexibility. I have nothing against making regulation more business-friendly, as long as it does not undermine the effectiveness, equity or efficiency of regulation. More importantly, I believe regulatory reform should give equal attention to finding ways to make regulation work better for consumers – enhancing the role of public participation in all aspects of the regulatory process. The reform agenda at the FCC should include steps to increase public participation in enforcement, expand reliance on multi-stakeholder processes that provide greater transparency for public input, and even introduce formal regulatory negotiations (reg-negs).

Regulation of Communications and Media

Regulation at the FCC and its reforms are particularly challenging because economic considerations, which are frequently the primary concern, are not the only or even primary focus of the FCC's attention. The FCC oversees key parts of the nation's media and communications systems, which are vital parts of the democratic public sphere. The FCC is charged with ensuring access to the means of communications, and ensuring that the communications network achieves the democratic/political and social/equity values that our society has expressed in the Communications Act.

There are no other agencies that have this express purpose. At the start of the 21st century's digital information age, with the convergence of communications and commerce, the importance of the political and social goals of the Communications Act is greater than ever.

Last week marked the 101st anniversary of the Mann-Elkins Act, which placed all forms of electronic communications – telephone, telegraph and wireless – under the Interstate Commerce Act. Congress realized that the interstate telecommunications network needed public interest oversight. Without it, communications would not flow seamlessly across the interstate network, consumers would be the targets of brutal discrimination and competition would be snuffed out by powerful incumbent network operators. Three quarters of a century ago, with the importance of telecommunications growing, Congress embraced the goal of universal service and created a separate agency

(the Federal Communications Commission) to take on the task of overseeing the telecommunications network.

While there have been peaks and valleys in the performance of the FCC, one area where it has performed quite well is discharging the foundational function of ensuring nondiscrimination and seamless interconnection of the interstate communications network. In a series of landmark decisions the FCC helped to create the remarkably rich communications environment in which we live today.

Forty years ago the FCC issued two pro consumer, pro-competitive decisions that laid the groundwork for the growth of the open Internet. The 1968 Carterfone decision required the network operators to allow anyone to design communications equipment and attach it to the network as long as it did not harm the network. In the First Computer Inquiry the FCC ensured that data transmitted over the network would be treated in the same nondiscriminatory manner that voice traffic was. For 30 years data traffic flowed freely over a network that was kept open by regulation to devices that were allowed on the network by regulatory mandate.

A quarter of century ago the FCC made another landmark, proconsumer, precompetitive decision to enhance access to communications, when it decided that bands in the spectrum in which incumbent users had expressed no interest, would be made available to the public on an unlicensed basis. Subject to simple rules of sharing a common pool resource, junk bands came to support hundreds of millions of WiFi users and created a space where holders of spectrum licenses can offload traffic. The nondiscriminatory interconnection and carriage mandated by the FCC are squarely in line with the original decision of Congress to place interstate telecommunications under the Interstate Commerce Act.

The Contemporary Challenge of the Digital Information Age

Some people look back on this history and see antiquated regulation. I view it as fundamental, traditional values that have served the nation well. In fact, in an economy that is increasingly driven by integrated flows of information and knowledge communications networks are more important than ever and access to the platforms (bottlenecks and choke points) these industries provide is critical to competition in services and economic development.

The problem in many markets, like telecommunications, is not too much regulation, but rather it is too little competition. The lack of competition is not the result of nefarious business practices or lax antitrust enforcement. The problem is that strong economies of scale and scope on the supply side mean very few competitors can achieve minimum efficient scale, while strong economies of scale on the demand side (known as network effects) create "winner-take-most" markets. The challenge for regulatory reform is to find ways to allow these key infrastructural industries to be profitable and innovative, while preventing the abuse of market power that inevitably flows from small numbers of firms

controlling essential platforms from undermining competitive applications and services that ride on the platform.

EVALUATION OF THE DISCUSSION DRAFT

Repeal of the Public Interest Standard

The Discussion Draft undermines the ability of the FCC to protect and promote the public interest. Section 2 (a) undermines the core principles of the Communications Act. It removes the broad public interest standard for rulemaking and puts a narrow harm standard in its place. A close reading of the Act leaves no doubt about this.

The word harm occurs only two times in the Communications Act and is not the standard by which the FCC is told to regulate by any stretch of the imagination. Concern is expressed about the "financial harm" the incumbent telephone companies could do to information service providers who are dependent on the telecommunications network. In contrast, the words "public interest" occur 103 times in the act, and this is the current standard for regulation and merger review. The harm standard is alien to the Communications Act and wholly inappropriate to accomplish the tasks that the Act gives to the FCC.

The harm standard is inadequate to protect the public interest in the communications sector for several reasons.

- First, as noted above, a substantial part of the Communications Act involves non-economic values of access to communications and speech, which are not amenable to narrow economic tests.
- Universal service is a second critical goal of the Communications Act that is not amenable to a narrow cost benefit harm based standard. The value of connecting households to the network is an externality that is difficult to measure but extremely important as a political, social and economic accomplishment.
- Consumer privacy, over which the FCC has significant authority in regard to CPNI is another area where a harm standard is difficult to implement.
- In a dynamic network industry, a public interest approach is much more appropriate for interconnection and nondiscrimination. It would have been impossible to value the Carterphone, Computer Inquiy, or the 802.11 (WiFi) rules in a harm-based context, but there is no doubt they delivered massive gains to the public.

This criticism applies to Section 2(j) which seeks to replace the public interest standard in merger review with a "narrowly tailored harm" standard. This would undermine the ability of the Commission to deal with the emerging characteristics of the industry at the precise moment and in the specific context of the merger. Mergers create unique challenges to the public interest that are best dealt with in the merger review. To

the extent that they reveal emerging trends in the industry, they provide a generally time-bound, real-world effort to deal with emerging characteristic.

These changes in the statute are unnecessary and undermine the ability of the FCC to protect and promote the public interest.

Failure to Deal with Agency Capture and Impotence

The most critical problem with the process of FCC regulation is the abuse of the *ex parte* process in which the most powerful and wealthiest parties run through the halls of the agency with little transparency and no restraint. The draft bill does nothing to address this problem.

The importance of the *ex parte* process is magnified by the failure of the agency to develop objective and independent sources of information on which to build its regulations. The agency has become dependent on industry sources for information, much of it slipped into the record through the *ex parte* process, without the opportunity for the public to comment on the data in a meaningful way. The Administrative Procedures Act should prevent this abuse, but it has failed to do so.

While the agency has begun to generate a small number of independent studies, the use of third party "scientifically important information," has failed to correct the problem because the guidelines of the Data Quality Act for peer review have not been followed.

The Discussion Draft will compound the problem by allowing Commissioners to meet in secret, subject to the same weak reporting requirement that afflicts the *ex parte* process today. To the extent that conversations take place between commissioners or between commissioners and outside parties, full transcripts of all such conversations should be made available in a timely manner.

Instead of dealing with the underlying problem, the Discussion Draft imposes a series of reporting requirements on the FCC to explain why self-imposed deadlines have been met and to draw up reports on developments in the industry. These will consume substantial resources, but have no direct relationship to improving the regulatory process as outlined above.

As always, I look forward to working with the Committee to develop any legislation that is needed to improve FCC regulation, although in this case I am not convinced legislation is needed. I am convinced that the discussion draft misses the mark and, if enacted, will not help the Commission do its job of protecting consumers and promoting the public interest.

Mr. WALDEN. Dr. Cooper, thank you for your testimony.

We will now go to Professor Ronald M. Levin with the William R. Orthwein Distinguished Professor of Law, Washington University School of Law. We welcome you today and look forward to your testimony, sir.

STATEMENT OF RONALD M. LEVIN

Mr. LEVIN. Thank you, Mr. Chairman and members of the committee.

I hope to provide a little different perspective on this bill from those of the other panelists because my specialization is not in communications law. It is in administrative law—in other words, the manner in which the legal system deals with regulatory cases in general, regardless of the agency. Now, I don't think that perspective gives you all the answers you need for this bill, but I think it will provide some helpful insights on some of its provisions.

For example, as the Sunshine Act reform, I think that perspective will tend to support the thrust of what you are doing. I know you have heard from the FCC veterans that the Sunshine Act often interferes with collaborative decision-making, forces agency heads to rely on staff intermediaries rather than talk to each other. But I think it is worth pointing out here that that critique is shared by numerous agency officials and practitioners and scholars who specialize in other fields of regulation. So I think if you go forward with the experiment in this bill, you would get strong support from much of the administrative law community.

On the other hand, I want to raise some warning flags about parts of the bill that would reshape FCC rulemaking procedures. Many students of the administrative process will tell you that agency rulemaking has become progressively more complicated over the past few decades, and this happens largely because Congress and presidents keep adding refinements to the process. Each of those refinements, they look appealing when considered in isolation, but in the aggregate, they make it progressively more difficult for agencies to carry out the tasks that Congress has told them to perform. So you really ought to think twice about provisions in the bill that would make it even harder for the FCC to complete a rulemaking proceeding. My statement goes into this in some depth, but I will just focus on three areas of concern in these remarks.

First, some of the new duties are ones you probably shouldn't impose at all. I really doubt that in every rulemaking proceeding that might be perceived as putting forward a burdensome rule, you should require the Commission to speculate about what performance measures to use to evaluate that rule sometime in the future. And I don't think the FCC should routinely have to specify what market failure, a new rule would resolve because market failure is not the only valid reason the FCC may have for issuing a rule.

Secondly, the bill provides some practices that the Commission should want to do much of the time but not necessarily all the time. And so you need to build in some flexibility. For instance, should the FCC have to solicit public comments twice during every rulemaking proceeding? Well, often that is very useful, especially when they didn't exactly tell you what they were planning to do the

first time. But at other times, a single round satisfies all the purposes of notice and comment and it should be enough.

Likewise, should they always provide a reply comment period after the traditional comment period? Well, sometimes they should, especially when some group that dumps these lengthy and controversial comments on the last day of the comment period, there should be a chance to reply. But that is not always the situation, and so you need to build in some room for the Commission to say, here, we don't need a reply and we should avoid the delay and move forward.

Finally, I think the committee should take another look at and rewrite the section that provides for the Commission to prepare a cost-benefit analysis to accompany any rule that would be burdensome. The intent here, as I understand it, is to put the FCC on par with executive agencies which now prepare cost-benefit analyses under the President Executive order, and the FCC isn't subject to that order. But the problem is that the scope of the Executive order is much more limited than your provision because that order provides for cost-benefit analysis in only a small fraction of law rulemaking and it provides the agency compliance with that order is not judicially reviewable.

If you were to allow broad judicial review under this bill, you would be inviting strenuous opposition to the bill. That was one of the main worries that led to the demise of APA reform in the mid-'90s. So if you want the bill to remain relatively noncontroversial, you need to avoid or limit judicial review and also narrow the scope of the cost-benefit requirement.

And with that, I will conclude my oral presentation. I hope it is helpful and I will be happy to respond to any questions.

[The prepared statement of Mr. Levin follows:]

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on "Reforming FCC Process"

June 22, 2011

Summary

I commend the subcommittee for exploring a range of options for improvement in the operations of the Federal Communications Commission. My testimony presents a critique of the administrative law aspects of the proposed FCC Process Reform Act. If the subcommittee is going to consider procedural legislation of this nature, it should take careful account of the precedents, writings, and institutional pronouncements that specialists in administrative law have set forth in this and other regulatory contexts.

In the case of Sunshine Act reform, many administrative law authorities would strongly endorse the premises of the subcommittee's current initiative. However, several of the proposals regarding FCC rulemaking are troubling, because they pose risks of unduly burdening the Commission's rulemaking process. In the interest of efficiency, which the caption of the proposed § 5A of the Communications Act declares to be a principal objective of the draft bill, these measures should be reappraised..

For example, the bill's requirements for advance public comment opportunities prior to the notice of proposed rulemaking, for minimum thirty-day comment periods, and reply comment periods all address beneficial practices, but the Commission should be accorded greater flexibility in implementing them.

Moreover, the bill should not require the Commission to explain the "market failure" that each rule is intended to solve, because many rules are legitimately adopted for other reasons. In any event, Congress should be cautious before it prescribes new analytical requirements for broad classes of rulemaking. It has not always been sufficiently cautious in the past. For the same reason, the Commission should not be routinely required to suggest performance standards to evaluate newly adopted rules.

Finally, the bill's requirements for cost-benefit analysis are written too broadly. Their evident purpose is to bring FCC practice into line with presidential executive oversight orders. The cost-benefit analysis obligations in those orders, however, apply to only a limited class of especially significant rules, and the sufficiency of agencies' compliance with them is not judicially reviewable. The bill should be revised to bring § 5A into closer conformity with these limitations.

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
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Before the U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on "Reforming FCC Process"

June 22, 2011

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss the proposed Federal Communications Commission Process Reform Act of 2011. My remarks today address the June 17 discussion draft of that bill.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for about thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA), and I currently serve as a public member of the Administrative Conference of the United States (ACUS). In this statement I will refer to some of these groups' positions on certain issues raised by the bill. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

The draft bill tackles a number of important issues relating to the functioning of the administrative process at the FCC. I commend the subcommittee for examining these issues, which often do not get as much attention in Congress as they deserve. At the same time, I urge the subcommittee to proceed cautiously and with ample consultation with specialists in

administrative procedure as its work on the bill unfolds. Today I will be able to address only a fraction of the potential questions the bill raises, but I hope that this preliminary assessment of the discussion draft will be helpful in identifying some areas that need further exploration.

I should add that I am not a specialist in communications law in particular. Thus, I do not intend to comment on the issues of communications policy that the draft bill raises. Instead, I will focus my remarks on the administrative law aspects of the bill, especially the provisions on rulemaking procedure in § 5A(a). Broadly speaking, many provisions in the draft bill raise questions about whether and how the operations of the FCC can be enhanced in terms of maintaining adequate transparency, accountability, and fairness to members of the public, without unduly impeding the ability of the Commission to fulfill its statutory responsibilities. Case law, scholarship, and institutional pronouncements in the administrative law field have much to say about these issues.

There is room for debate as to whether Congress should undertake to alter the FCC's procedures on an agency-specific basis, instead of leaving the Commission to apply generic administrative law principles such as those codified in the Administrative Procedure Act (APA). If the legislature is going to make such an effort, however, it should at the very least pay close attention to positions that experienced judges, practitioners, agency officials, and scholars have reached over the years with respect to those processes in this and other regulatory contexts. To the extent that the bill's proposals are out of synch with those perceptions, there is good reason for the subcommittee to tread cautiously and consider whether it might not be on the right track.

I also believe that decisions about FCC procedure should not depend on one's views about the current substantive policies of the Commission. Presumably, any process changes that

may be enacted in this bill will endure into future years when the policies of the Commission have headed in new directions. The goal should be to identify the best decisionmaking approaches for the Commission, regardless of whether, at any given time, they will be utilized in the service of new regulation or deregulation.

A principal theme of my testimony will be that a number of provisions in the bill may unduly burden the process of decisionmaking at the FCC, particularly in rulemaking matters. The subcommittee should hesitate to make the process more cumbersome than it already is. Although the caption of the proposed § 5A of the bill would be "Transparency and Efficiency," there are grounds for concern that some of the proposals would result in unjustified *inefficiency*. Also, the bill does not sufficiently distinguish significant rules from minor ones. Procedural requirements that may be well justified in relation to highly consequential regulations may turn out to be disproportionate in relation to rules that will have only limited impact.

Against the background of the above general comments, following are some comments on specific provisions of the draft bill. I will introduce each comment with a brief description of the relevant provision. Although these descriptions may slightly oversimplify the actual bill language, my intention is to improve the readability of this testimony, so I hope any small lack of precision will be forgiven.

§ 5A(a)(1)(A): This subsection essentially provides that the Commission may not issue a notice of proposed rulemaking (NPRM) unless it has, within the past three years, sought public comment on a notice of inquiry, a prior NPRM, or a petition for rulemaking on the same or a substantially similar subject matter. In effect, this provision means that no rulemaking may be completed without two rounds of public comment. I am concerned that an inflexible requirement

of this nature would sometimes add unnecessary delay to the rulemaking process.

To be sure, I believe that notices of inquiry (also known as advance notices of proposed rulemaking) can frequently be quite helpful to an agency such as the FCC, especially where the agency has only a general idea of what it wants to accomplish and uses the preliminary comment period to refine its thinking. At other times, however, the agency has a fairly clear idea of what it wants to accomplish, perhaps because the rule deals with a very narrow subject. In that circumstance, it may be more efficient to proceed directly to the NPRM. After all, the traditional post-NPRM comment period would still provide an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. The choice between these alternatives in a particular situation seems essentially a managerial question, and no single solution is necessarily right for all rulemaking proceedings.

§ 5A(a)(1)(B): This subsection requires that every NPRM should set forth the specific language of a proposed rule. I believe that inclusion of specific language is normally a very good idea, especially when one bears in mind that the Commission has the option of using an advance notice of proposed rulemaking if its thinking has not progressed to the point of being able to propose a specific rule. I am not sure whether there are circumstances in which the Commission cannot reasonably be expected to comply with this expectation. Perhaps specialists in FCC practice or officials at the Commission could identify some. If so, a possible middle ground for the subcommittee to explore would be that the Commission should be required to offer a second round of public comments if, but only if, its initial NPRM does not propose specific rule language.

I am more skeptical, however, about the subsection's further requirement that an NPRM

must contain "proposed performance measures to evaluate" a proposal that "may impose additional burdens on industry or consumers." Given that numerous, perhaps most, rules could be described as imposing "burdens," the requirement seems too confining. We are all familiar with the adage that hindsight is more reliable than foresight. This truism suggests that criteria for evaluating the success of a rule will often be best chosen after experience has developed. Consequently, I doubt that requiring the Commission to speculate in advance in almost every rulemaking proceeding as to the grounds by which future decisionmakers will want to judge the success of the rule would be worth the additional complexity that this requirement would bring to the process.

§ 5A(a)(1)(C): This subsection requires a minimum comment period of 30 days, with a minimum additional 30-day period for reply comments. In 1993, ACUS recommended that Congress consider requiring a 30-day minimum comment period, "provided that a good cause provision allowing shorter comment periods or no comment period is incorporated."[1] In line with this recommendation, I would suggest that if the subcommittee decides to go forward with this requirement, it should include a provision that permits the Commission to bypass the requirement if it can establish good cause for doing so.

This suggestion is consistent with a related recommendation that ACUS adopted only last week.[2] The recommendation – which is advisory only and does not propose legislation –

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[1]ACUS Recommendation 93-4, ¶ IV.B; *see also Florida Power & Light Co. v. United States*, 673 F.2d 525 (D.C. Cir. 1982) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

[2]ACUS Recommendation 2011-2, ¶ 2. The recommendation is expected to be posted within a few days at http://www.acus.gov/administrative-fix-blog/. Because the exact language has not been finalized, I describe the recommendation only in general terms here.

suggests that agencies should *as a general matter* allow sixty-day comment periods for "significant regulatory actions" and thirty-day comment periods for other rules. It goes on to indicate, however, that agencies may in appropriate circumstances set shorter comment periods if they provide an appropriate explanation.

I also would favor providing the Commission with a degree of discretion in regard to providing an opportunity for reply comments. I believe such an opportunity is frequently useful, particularly where initial comments are submitted at the very end of the comment period. By definition, however, allowance of a reply comment period results in some delay in the issuance of a rule. In a particular situation, the agency might conclude that this delay would not be justified by any offsetting benefit, such as where nobody opposed the rule, or where the only opposing views regarding the rule were filed in plenty of time to have enabled persons who might disagree with those views to respond. If the subcommittee decides to prescribe a reply comment period as a standard practice, it should allow a good cause exception here as well.[3]

§ 5A(a)(2)(A): This subsection seems to be basically a cross-reference to § 5A(a)(1)(A), and the above critique of that subsection also applies here.

§ 5A(a)(2)(B): This subsection essentially provides that an adopted rule must be a "logical outgrowth" of the rule proposed in the NPRM. That test reflects existing case law,[4] which is not particularly controversial. Therefore, while one could debate whether the provision is necessary, it can be viewed as a helpful codification of prevailing administrative law.

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[3]This suggestion is consistent with the new ACUS Recommendation 2011-2, ¶ 6, which encourages agencies to allow reply comment periods *where appropriate.*

[4]*Long Island Care at Home v. Coke*, 551 U.S. 158 (2007).

§ 5A(a)(2)(C)(i): This provision requires that a final rulemaking order that adopts, modifies, or deletes a rule that "may impose additional burdens on industry or consumers" must include an "identification and analysis of the market failure and actual harm to consumers that the adoption, modification, or deletion will prevent." In my judgment, this language is too confining. It might be acceptable in relation to regulations that are primarily intended to serve economic ends; but not all regulations that the Commission might devise as it implements its wide responsibilities would necessarily fit that description. For example, the Commission might propose a rule for the purpose of complying with a congressional directive or court order. It should be able to say so directly, without having to dream up a "market failure" theory to accompany that straightforward explanation.

Or – to use an example drawn from a case about which I have recently written in my own scholarship – suppose the Commission wanted to adopt a rule to codify its holding in *Fox Television Stations, Inc. v. FCC*[5] that television stations may not broadcast awards shows in which celebrities utter "fleeting expletives" that may be offensive to families with children. "Market failure" would be quite peripheral to the purposes of such a rule, and the Supreme Court acknowledged that the Commission's evidence of "actual harm" was also scant.[6]

In this regard, the language of § 5A(a)(2)(C)(i) seems similar in its intentions to the benchmarks that recent Presidents have incorporated into their executive oversight orders. In fact, however, the terms of those orders have all contemplated broader latitude for rulemaking agencies. Perhaps the closest analogy would be to the directive in President George W. Bush's

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[5]129 S.Ct. 1800 (2009).

[6]*Id.* at 1813.

oversight order, but that directive was actually more openended. It said that agencies should identify the "specific market failure . . . *or other specific problem*" that a particular rule intends to address.[7] President Clinton's oversight order, revived and reaffirmed by President Obama,[8] was even less confining in this regard.[9] In short, market failures are frequently pertinent, but all of the recent oversight orders reflect a sound insight that they should not be treated as controlling in all circumstances.

Putting to one side issues about the precise wording of § 5A(a)(2)(C)(I), I would recommend against including a provision of this nature in the bill. That view is consistent with a 1993 ACUS recommendation that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[10] In a similar vein, the ABA, in a 1992 resolution sponsored by the Administrative Law Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[11] The Section's report supporting this latter pronouncement

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[7]The italics are mine, but the exact language was: "Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted." Executive Order 13,422, § 1(b)(1), 72 Fed. Reg. 2763 (2007).

[8]See Executive Order 13,563, § 1(b), 76 Fed. Reg.3821 (2011).

[9]Executive Order 12,866, § 1(b)(1), 58 Fed. Reg. 51,735 (1993) ("Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.").

[10]ACUS Recommendation 93-4, *supra*, ¶ II.C.

[11]ABA Recommendation 113, 117-1 ABA Reps. 31, 469 (1992).

contained the following pertinent warning:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [T]he existence of multiple requirements could have the effect of stymieing appropriate and necessary rulemaking.[12]

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased.[13] So the warnings of these two groups have become even more timely. Deliberating on, seeking consensus on, and drafting the numerous recitals that are currently required consumes real resources – a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. In short, mandatory recitals regarding specific issues (such as the relationship between a rule and market failure) often seem appealing on their own terms, but their collective impact is debilitating.

To be clear, I agree, of course, that Congress acts within its legitimate and constitutionally necessary role when it gives substantive direction to the FCC and other agencies in their respective organic statutes. The extent to which the FCC should focus on "market failures" and other types of harm to industry and consumers is certainly a matter for the legislature to determine. However, I see no need for the *procedural* sections of the Communications Act to spell out issues that a rulemaking order must address. Even without

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[12] *Id.* at 470.

[13] One scholar has compiled a list of eighteen different mandates impinging on agency rulemakers by virtue of executive orders and statutes othre than the APA, although not all of these mandates apply to the FCC. Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. U.L. Rev. 533 (2000).

such language, the courts will require the Commission to explain carefully the reasoning that lies behind any given rule — including, most prominently, the manner in which the rule promotes whatever objectives the substantive mandates in the Act have instructed the Commission to pursue.

§ 5A(a)(2)(C)(ii): This provision requires that every rule that "may impose additional burdens on industry or consumers" must be accompanied by a cost-benefit analysis. It is my understanding that the impetus for this requirement is the idea that executive agencies are obliged by presidential executive order to prepare cost-benefit analyses to accompany their rules, but the FCC is not, because the relevant portions of the order do not apply to the Commission and other independent agencies.[14] Thus the intent is to bring FCC rulemaking into line with the requirements that executive agencies already observe.

For the sake of discussion, I will accept the premise of the subsection as just stated. That said, however, the provision needs revision because, as it stands, it actually goes beyond the presidential executive order in two important respects. First, presidential executive orders have never required cost-benefit analyses for *all* rules. Rather, the prevailing guideline, which has been in place for many years, is that the oversight order prescribes cost-benefit analyses only for

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[14]Majority Committee Staff Memorandum accompanying the subcommittee's May 11, 2011 hearing on FCC Process Reform 2 (May 11, 2011), available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Memo.pdf The memo referred in this connection to President Obama's Memorandum for the Heads of Executive Departments and Agencies, *Regulatory Flexibility, Small Business, and Job Creation*, 76 Fed. Reg. 3827 (Jan. 21, 2011), but I assume that the intent was actually to cite to the President's Executive Order 13,563, *supra*, which was issued simultaneously. The executive order does apply in relevant part to executive agencies only, *see id.* § 7(a) (incorporating by reference Executive Order 12,866, supra, § 3(b)), but the presidential memorandum dealt with the Regulatory Flexibility Act, which already applies to both executive agencies and independent agencies, including the FCC. 5 U.S.C. § 601(1).

"significant regulatory actions."[15] Each year, only about six hundred rules proposed by *all* federal agencies covered by the order are designated as falling within this category.[16] Moreover, the most intensive cost-benefit obligations are reserved for a narrower set of rules, "economically significant regulatory actions."[17] Roughly speaking, these are rules that may have an annual effect on the economy of $100 million or more. Only about a hundred proposed rules per year are determined to fall within this more limited category.[18]

In contrast to this carefully calibrated set of threshold criteria, § 5A(a)(2)(C)(ii) sets a much lower bar. Virtually any substantive rule that imposes requirements, as distinguished from benefits, might be described as one that "may burden industry or consumers." Thus, the subsection seems very overbroad in its scope. Preparation of a professional, sophisticated cost-benefit analysis is a resource-intensive activity that requires close attention of qualified policy analysts. It is reasonable to require such scrutiny prior to the issuance of highly expensive or consequential regulations, as the executive oversight order does. As to routine regulations, however, such a requirement would, itself, not be cost-justified.

Second, an important feature of the cost-benefit analysis obligations in the presidential executive order is that the adequacy of an agency's compliance with these obligations is *not*

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[15]Executive Order 12,866, *supra*, §§ 3(f), 6(a)(3)(B)(ii). The Bush and Obama orders made no changes to the Clinton order in this regard.

[16]Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 847 (2003).

[17]Executive Order 12,866, *supra*, §§ 3(f)(1), 6(a)(3)(C).

[18]Croley, *supra*, at 851.

judicially reviewable.[19] Courts will consider whether the agency's rule is defensible on the merits in light of the cost-benefit analysis documents in the record, but they do not treat an agency's possible failure to perform the analysis as the executive order contemplates as being, in and of itself, a basis for reversal.[20] As § 5A(a)(2)(C)(ii) is currently written, however, the FCC's compliance or noncompliance with that subsection would presumably be judicially reviewed in the same way as any other alleged violation of the Communications Act.

If the subcommittee chooses to leave this provision as it stands, the likelihood and magnitude of opposition to the bill would likely increase enormously. This prediction rests on direct experience in connection with proposals to amend the Administrative Procedure Act (APA) during the regulatory reform debates of 1995. Proposals to codify cost-benefit requirements and to open up agencies' fulfillment of those mandates to challenge in the courts led to fierce opposition. This issue was a major factor that caused the proposed amendments to stall and eventually die, following filibusters in the Senate.[21] There is good reason to anticipate, therefore, that the prospect of unfettered judicial review of compliance with § 5A(a)(2)(C)(ii) would greatly augment the apprehensions of some constituency groups that FCC regulation could be hampered by the threat or reality of unproductive or obstructive litigation.

If the subcommittee wishes to avoid this level of controversy, it should consider foreclosing judicial review of the FCC's compliance with this subsection, or at least

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[19] *Id.* § 10.

[20] *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986).

[21] Ronald M. Levin, *Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar*, 83 Wash. U.L.Q. 1875, 1887-88 (2005).

circumscribing it. One option for limiting, though not eliminating, judicial review was, in fact, proposed by the House of Representatives in a bill it passed during those same 1995 debates. Its bill would have prescribed a "substantial compliance" test for judicial review of agency risk assessments (a form of regulatory analysis closely related to cost-benefit analysis).[22]

In short, if the basic purpose of § 5A(a)(2)(C)(ii) is to place the FCC on an equivalent footing with most executive agencies, Congress can fulfill that purpose with much less overbreadth and controversy if it will limit the scope of the subsection as I have suggested.

§ 5A(a)(2)(c)(iii): This subsection provides that a final rule that "may impose additional burdens on industry or consumers" must be accompanied by "performance measures for evaluating the effectiveness of" the rule. I would be skeptical about the value of this requirement for the same reasons as I discussed regarding the corresponding requirement for NPRMs, in § 5A(a)(1)(B)(ii) above.

§ 5A(b): This subsection essentially provides that, in all FCC proceedings, all commissioners should be informed of available options and have adequate time to review the proposed decision, and the public should have adequate time to review the proposed text before the Commission votes.

I do not have the specialized knowledge that I would need in order to comment meaningfully on the ground rules that should prevail among commissioners. Even the provision that relates to the interests of the general public might be better addressed by observers who

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[22]H.R. 9 (as amended and engrossed in the House), § 441, 104th Cong. (1995); *see also* 2010 Model State Administrative Procedure Act § 305(f) ("If an agency has made a good faith effort to comply with this section [which requires a cost-benefit analysis for certain rules], a rule is not invalid solely because the regulatory analysis for the proposed rule is insufficient or inaccurate.").

practice before the Commission. However, I will offer one observation regarding the latter provision. If any such mandate is enacted, it should be drafted with sufficient latitude to take account of the diversity of matters that come before the Commission. As to some of these matters, a requirement that the public must have advance access to the text of a proposed decision may be ill-advised. Some such matters may be confidential. Some may be urgent. Some may be minor in importance. Some may be adjudicative matters presenting narrow factual issues on which public input would be of little value. If the subcommittee goes forward with this subsection, it should ensure that the rulemaking authority granted by the preamble to § 5A(b) is sufficiently broad to allow the Commission to take account of these circumstances.

§ 5A(c): This subsection would set forth a new approach to facilitating nonpublic collaborative discussions among commissioners. It would, therefore, constitute an alternative to the constraints now imposed by the Government in the Sunshine Act. I strongly support this initiative. Like many authorities on administrative law, spanning the ideological spectrum, I concur in the subsection's premise that the Sunshine Act, as presently structured, can often hamper effective deliberation among multimember administrative bodies.[23] I anticipate, therefore, that you would find wide support in the administrative law community for an experiment with a different approach.

I have not formed an opinion about the specific mechanism proposed in § 5A(c), but I certainly believe it is worthy of sympathetic consideration by your subcommittee and by the Congress.

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[23] *See* Letter from Chairman Powell and Commissioner Copps to the Honorable Ted Stevens, Feb. 2, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256655A1.pdf.

§§ 5A(d)-(j): All of these provisions relate to communications policy, public administration and management, and other issues distinctive to the FCC. Because they fall outside the traditional domain of administrative law, I will respectfully refrain from commenting on them and leave them for discussion by persons who are more knowledgeable than I am in those areas.

This concludes my written testimony, and I will be happy to respond to any questions that you may have. Thank you again for inviting me to testify today.

Mr. WALDEN. Professor, it is very helpful and we thank you for your testimony and your counsel.

We will go now to our final witness on the panel, Mr. Randolph J. May, President of the Free State Foundation. Mr. May, we are delighted to have you with us and we look forward to your testimony.

STATEMENT OF RANDOLPH J. MAY

Mr. MAY. Thank you, Mr. Chairman and members of the committee. Thank you for inviting me to testify. I am president of the Free State Foundation, a nonpartisan research and educational foundation. The Free State Foundation is a free market-oriented think tank that focuses its research in the communications law and policy area. By way of background, I should note that I am a past chair of the ABA's Section of Administrative Law, and I am currently a member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So today's hearing on FCC process reform is at the core of my expertise in communications law and policy, as well as administrative law.

As a frame of reference for my testimony, I want to recite statements made over a decade ago by two different FCC commissioners, one Democrat and one Republican. FCC Chairman William Kennard in August 1999 released a strategic plan entitled, "A New FCC for the 21st Century." The plan begins, "In 5 years, we expect communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. As a result, over the next 5 years, the FCC must wisely manage the transition from an industry regulator to a market facilitator. The FCC as we know it today will be very different in both structure and mission." That was in 1999.

In December 2000, then-FCC Commissioner—soon-to-be Chairman—Michael Powell said, "Our bureaucratic process is too slow to respond to the challenges of internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and greater simplicity to the market." These statements provide a useful frame of reference for considering FCC reform.

I support many of the reforms proposed in the draft bill, and I do discuss them at greater length in the testimony. Right now I just want to highlight a few of the provisions and then talk briefly about one additional provision.

I endorse the provision that would require the Agency with respect to the adoption of any new rule that may impose additional burdens, to analyze the market failure and actual consumer harm the rule addresses, to perform cost-benefit analysis, and to include measures for evaluating the effectiveness of the rules.

The FCC has had a pronounced tendency over the years—and certainly this tendency was evident with respect to the adoption late last year of new net neutrality regulations—to adopt rules without engaging in meaningful analysis that would be required by the proposal. The requirement to analyze any claimed market failure and consumer harm before adopting new rules should force the FCC to engage in more rigorous economic analysis than it often

does when it relies on the indeterminate public interest standard for authority.

I am not going to probably agree with much that Mark Cooper said here today possibly, but he is correct that the public interest standard that is found in over 100 provisions in the Communications Act. I wholeheartedly endorse the proposed changes to the Sunshine Act. They have been noted and I won't dwell on those here, but I support those.

The provision reforming the Commission's transaction review process is as important as any other provision in the draft bill. In light of the continued abuses—and I think they have increased over the past decade—in the merger review process. The Agency often imposes extraneous conditions after they are "volunteered at the last minute by transaction applicants anxious to get their deal done." And this is after the transactions have been subject to reviews already lasting a year or more.

The requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the Agency can adopt a rule to the same effect will go a long way to reforming the review process.

My own preference would be to go even further and reduce the substantial overlap that now occurs between the Department of Justice and the FCC and have the Department of Justice primarily responsible for assessing the competitive impact of a transaction.

As I said early in my testimony, the reality is that most segments of the communications marketplace are not effectively competitive. When Congress passed the Telecom Act of 1996, it anticipated the development of a competitive marketplace stating in the statute's preamble that it intended for the FCC to "promote competition and reduce regulation." The FCC has not done nearly enough in the 15 years since the passage of the '96 act to reduce regulation.

Whatever the reason, the point is that a fix is needed and the draft bill, while commendable in many respects, does not directly address the problem of reducing existing regulations. I don't have time to address it at any length now, but I hope you will consider adopting a proposal that I have made that would amend the forbearance provision of the act and the regulatory review provision in the act that were both included in the 1996 act to be used as clearly the regulatory tools that have been used only sparingly. And they could be amended very simply to allow those provisions to be much more effective in achieving less regulation and getting rid of unnecessary regulations that are on the books now.

Thank you very much for inviting me here today, and I look forward to your questions. Thank you.

[The prepared statement of Mr. May follows:]

Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "Reforming FCC Process"

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

June 22, 2011

Testimony of Randolph J. May
President, The Free State Foundation

Mr. Chairman and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy area. While I am not speaking on behalf of these organizations, by way of background I should note that I am a past Section Chair of the ABA's Section of Administrative Law and Regulatory Practice, and I am currently a public member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on FCC process reform is at the core of my expertise in communications law and policy and administrative law and regulatory practice.

As a frame of reference for my testimony, and for your consideration of FCC reform, I want to invoke statements made over a decade ago by two different FCC commissioners. In August 1999, FCC Chairman William Kennard released a strategic plan entitled, "A New FCC for the 21st Century." The plan's first four sentences read:

> "In five years, we expect U.S communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator. The FCC as we know it today will be very different in both structure and mission."

In December 2000, then-FCC Commissioner (soon-to-be FCC Chairman) Michael Powell delivered his visionary "Great Digital Broadband Migration" speech in

which he said: "Our bureaucratic process is too slow to respond to the challenges of Internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market."

For my purposes, these statements, one by a Democrat and the other by a Republican FCC Chairman, provide a useful frame for thinking about today's topic. Without belaboring the point now, we should be able to agree that, as Bill Kennard predicted, U.S. communications markets are now "characterized predominately by vigorous competition," and as Michael Powell said, we need to "clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market." Hence the need for FCC regulatory reform.

While I don't necessarily endorse all of the proposed reforms in the Discussion Draft, I certainly support most of them and commend you for undertaking this effort. In my testimony, I want to just highlight the ones that I think are most important, and then propose another reform that I believe would be most effective in bringing the FCC's body of regulations, many of which are now unnecessary, more closely in line with today's competitive marketplace environment.

Taking them generally in the order they appear in the draft bill, I want to especially endorse the provisions that would require the agency, with respect to the adoption of a new rule that may impose additional burdens on industry or consumers, to identify and analyze the market failure and actual consumer harm the rule addresses, to perform a cost-benefit analysis of the rule, and to include measures for evaluating the effectiveness of the rule. The FCC has had a pronounced tendency over the years, and certainly this tendency was evident with respect to the adoption late last year of new net

neutrality regulations, to adopt rules without engaging in the type of meaningful analysis required by the proposal. Certainly, the requirement that the Commission analyze any claimed market failure and consumer harm before adopting new rules should force the FCC to engage in a more rigorous economic analysis than it often does when it simply relies on the indeterminate public interest standard as authority.

I wholeheartedly endorse the propose changes to the Sunshine Act. Currently, the Act's strictures, without any meaningful public benefit, prevent the agency's five commissioners from engaging in the type of collaborative discussions that may lead to more reasoned decision-making. And they inhibit the development of greater collegiality among the commissioners, which itself may contribute to more effective functioning of a multi-member commission. I led a study in 1995 on this subject for the Administrative Conference of the United States, the results of which are published in 49 *Administrative Law Review* 415, which made recommendations similar to the draft bill's proposals.

Relatedly, I support the provision that would require publication of the text of agenda items in advance of an open meeting so that the public has the opportunity to review the text before a vote is taken. As you know, before each and every item is considered by the commissioners at a public meeting, the staff requests and is granted so-called "editorial privileges." Because the public does not have the text upon which the commissioners are voting, the public has no way of knowing the extent to which a draft order is actually changed – that is, the extent to which editorial privileges are exercised and for what purpose – after a vote and before the item *eventually* is released as a final order. I emphasize "eventually" in the previous sentence because, as this Committee knows, there have been some lengthy delays in releasing orders to the public after they

supposedly have been approved at open meetings. Thus, I support the provision that requires the Commission to publish each order or other action no later than 7 days after the date of adoption, or at least within some reasonably short period.

Along the same lines, I support the provision that requires the Commission to establish deadlines for Commission orders and other actions and to release promptly certain identified reports. And I support the provision in the draft bill that provides that the Commission may not rely in any order or decision on any statistical report or report to Congress, or *ex parte* communication, unless the public had been afforded adequate notice and opportunity to comment. The Committee is aware that a large amount of material, including studies, articles, and reports, was "dumped" into the docket of the net neutrality proceeding only a few days before the Commission adopted a draft order citing many of these documents. This last-minute "data dump" made it difficult, if not impossible, for the public to review and comment on the new material in the docket.

In my view, the provision reforming the Commission's transaction review process is as important as any other in the bill in light of the abuse of the process for many years now. The agency often imposes extraneous conditions -- that is, conditions not related to any alleged harms caused by the proposed transaction – after they are "volunteered" at the last-minute by transaction applicants anxious to get their deal done. The bill's requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same effect, would go a long way to reforming the review process. Indeed, I first suggested these reforms in an essay entitled "Any Volunteers?" in the March 6, 2000

edition of *Legal Times*. And as said in that essay, my own preference would be to go even further to reduce the substantial overlap in work and expenditure of resources that now occurs when the antitrust agencies and the FCC engage in a substantial duplication of effort. I would place primary responsibility for assessing the competitive impact of proposed transactions in the hands of the Department of Justice and the Federal Trade Commission, the agencies with the most expertise in the area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.

Towards the end, the bill requires that the Commission produce a biennial report for Congress that identifies "the challenges and opportunities in the communications marketplace for jobs, the economy, the expansion of existing businesses, and competitive entry as well as the Commission's agenda to address the identified issues over the course of the next 2-year period." I am not opposed to requiring the Commission to produce such a report, and in fact it could be a useful exercise if taken seriously. But this requirement should only be adopted if Congress eliminates the existing requirements for the agency to produce the regular video competition reports, wireless competition reports, and Section 706 broadband reports. If the new report is done properly, continuation of these pre-existing reports would be duplicative and a waste of resources.

As I said early in my testimony, the reality is, as FCC Chairman William Kennard predicted in 1999, most segments of the communications marketplace are now effectively competitive and have been so for a number of years. Indeed, when Congress passed the landmark Telecommunication Act of 1996, it anticipated the development of a competitive marketplace, stating in the statute's preamble that it intended for the FCC to

"promote competition and reduce regulation." And, in the principal legislative report accompanying the 1996 act, Congress stated its intent to provide for a "de-regulatory national policy framework." In other words, Congress concluded, correctly, that the development of more competition and more consumer choice should lead to reduced regulation.

But the FCC has not done nearly enough in the 15 years since the 1996 Act's adoption to "reduce regulation" and provide a "de-regulatory" policy framework. There may be various explanations, including just plain bureaucratic inertia, as to why this is so. Whatever the reason, the point is that a fix is needed, and the draft bill, while commendable in many respects, does not directly address the problem of reducing or eliminating *existing* regulations. It should do so. I hope you will consider adopting a simple measure I have proposed to better effectuate what Congress surely intended to be the 1996 Act's deregulatory intent.

The 1996 Act introduced two related deregulatory tools rarely – if ever -- found in other statutes governing regulatory agencies. The first provision, Section 10 of the Communications Act, titled "Competition in Provision of Telecommunications Service," states the Commission "shall forbear" from enforcing any regulation or statutory provision if the agency determines, taking into account competitive market conditions, that such regulation or statutory provision is not necessary to ensure that telecommunications providers' charges and practices are reasonable, or necessary to protect consumers or the public interest. The second provision, Section 11 in the Act, titled "Regulatory Reform," requires periodic reviews of regulations so that the Commission may determine "whether any such regulation is no longer in the public

interest as a result of meaningful economic competition between providers of such service." The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

While these two provisions obviously were added as tools to be used to reduce regulation in the face of developing competition, the FCC has utilized them only very sparingly. In its forbearance and regulatory review rulings, the agency generally takes a very cramped view of evidence submitted concerning marketplace competition — for example, refusing to acknowledge that wireless operators compete with wireline companies by offering substitutable services, or that potential entrants exert market discipline on existing competitors, or that present market shares are not as meaningful in a technologically dynamic, rapidly changing marketplace as they may be in a static one.

So, Congress should amend the Communications Act to make the Section 10 forbearance and Section 11 periodic review provisions more effective deregulatory tools. It can accomplish this simply by adding language that requires the FCC to presume, absent clear and convincing evidence to the contrary, that the consumer protection and public interest criteria for granting regulatory relief have been satisfied. (I have proposed language in "A Modest Proposal for FCC Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory," April 7, 2011, which may be found at: http://www.freestatefoundation.org/images/A_Modest_Proposal_for_FCC_Regulatory_Reform.pdf.)

I am not proposing that the specified consumer protection and public interest criteria be changed. But by establishing such a rebuttable evidentiary presumption, only those regulations supported by clear evidence that the substantive criteria have not been

met would be retained. And it is important to note that the two regulatory relief provisions should be made applicable to all entities subject to FCC regulation, not just telecommunications providers. I understand that it is possible the FCC might seek to ignore or skew evidence in order to rebut the deregulatory presumption, but I assume the agency's good faith in following congressional directives – and, in any event, the agency's decisions are subject to review by the courts.

In my view, based on years of watching the FCC treat the forbearance and regulatory review provisions in a way that has weakened the impact of their clear deregulatory intent, I believe my proposal to amend Sections 10 and 11 of the Communications Act may be one of the most effective measures Congress can take to reduce or eliminate unnecessary and outdated FCC regulations. I hope the Committee will consider the proposal in conjunction with other reform measures it is considering.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.

Mr. WALDEN. Thank you very much, Mr. May, and thank you to all of our panelists who have given us great counsel here today. We appreciate it. Some I appreciate more than others. No, I am just kidding. That is why we had you here. We needed the honest assessment of what works and what doesn't work in this bill.

Mr. May, I think when we get into this discussion of what is in the public interest, it really is what any three commissioners decide at the time as they are reaching some agreement. It is pretty broadly determined, is that not correct?

Mr. MAY. It is about as indeterminate, I think, as any other phrase could be. And I have to confess I have used that, whatever three commissioners say it is on any given day many times myself. But it absolutely is and, in fact, I wrote a law review article about 10 years ago in which I counted up those provisions. That is why I know Mr. Cooper is correct. But the point is that it provides no guidance to the Commission and it does need changing.

Mr. WALDEN. I seek unanimous consent to enter into the record an article by Phil Weiser, who just left the White House as National Economic Council to return to the University of Boulder. Without objection, we will put this in the record.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. In the article, he notes that frequently the FCC seeks to leverage its authority to approve mergers, to obtain concessions that often have little or nothing to do with the competitive issues raised in the transaction. And I think that is at the heart of the matter of what I, at least, and I think many members on this committee are trying to get at. It is not that you ignore or eviscerate the public interest standard; it is when it is used as an excuse to go do something you don't have the authority to do through your own organic statute.

Commissioner Abernathy, do you agree the Commission should not leverage merger reviews to obtain concessions that have little or nothing to do with the transaction's specific harms?

Ms. ABERNATHY. I have said that previously in speeches and I do agree. Now, just to be clear, in transactions where I was involved with other commissioners, you do have disagreements about a public interest issue associated with the transaction, so I may think a particular condition isn't required. But this still leaves, I think, a tremendous amount of ability for the commissioners to address the issues that are raised by the transaction. You may have disagreements about whether it is really a problem or not, but I think it does leave a tremendous amount of discretion to the commissioners.

Mr. WALDEN. As I listened to your testimony and read it in advance, it seems like there is concurrence, that having the text proposed rules available to the public and to other commissioners is something you all agree on. Does anybody disagree with that?

Mr. MAY. Could I just respond?

No, I don't disagree. You know, in theory——

Mr. WALDEN. Let me get an answer. Does anybody disagree with having the text made available prior to the votes in the Commission? Mr. Levin?

Mr. LEVIN. Only to the extent that as a non-specialist in this area, it occurred to me there might be a wide range of situations

where that wouldn't work because it is urgent, because it is a very minor matter where you are just talking about a factual dispute and in an adjudication, the public has nothing to say about it. There might be feasibility limitations. I do agree with it as a general proposition.

Mr. COOPER. I would go one step further and I would like that kind of provision to apply to merger reviews as well so that at the end of the process when—so we have that under the antitrust laws. The public should be allowed to comment on the conditions that were adopted. Now, that may or may not address some of the concern about extraneous issues——

Mr. WALDEN. Right.

Mr. COOPER [continuing]. But in that further review, if things were truly extraneous, people would have a chance to comment on that and the Agency could, in fact, be informed by that process. But full comment on an actual rule is the essence of democracy.

Mr. WALDEN. Mr. May?

Mr. MAY. I think the provision you are referring to here is the one that would require that the text that the Commission is considering at a meeting be made available to the public, and in response to Professor Levin's concern, I don't think your draft specifies the time before the meeting that it has to be available, so my understanding is it could be very shortly before.

But in other agencies, this might not be deemed perhaps as necessary, but as I point out in my testimony, what happens at the FCC in a public meeting, as you may know, is that at the presentation of an item, the staff before every item says, "Mr. Chairman, we request editorial privileges." And the chairman says "granted." And then no one has the text and sometimes it is weeks before the item is ultimately released to the public. And you really don't know what is going on. Because of the delay in the release of the item, you don't know whether that was——

Mr. WALDEN. Right.

Mr. MAY [continuing]. Editorial or not. And that is why it is useful.

Mr. WALDEN. And my time has run out.

Ms. Abernathy, did you want to make a quick comment?

Ms. ABERNATHY. Well, the way the actual process works is that you have the text of the item that you are voting on that day and then you are writing separate statements. Many of the commissioners are writing separate statements. And so I had never seen a situation where editorial privilege changed anything of significance in the item. But there are procedures that still need to be recognized, and I think that is part of the reasons for today's hearing is to understand that it is not as simple as just kicking the order out the door. You still need to review it one last time, get separate statements from the commissioners. It shouldn't take a long time but there is that process.

Mr. WALDEN. Thank you. I now recognize the gentlewoman from California, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman, and thank you again to all the witnesses. I think that you have been highly instructive to us.

First off, I don't think I heard anyone say that they were opposed to the FCC Collaboration Act, is that correct? Anyone opposed? No. I think there was a consensus on that, which pleases me.

To Commissioner Abernathy, thank you again for your testimony. As you know as part of the Verizon/Frontier transaction, Frontier offered voluntary commitments to build out broadband deployment and meeting broadband needs of anchor institutions which I salute you for. I wish Congresswoman Matsui were here because she has worked very hard on the whole issue of serving anchor institutions.

At any rate, those anchor institutions are within the areas to be served by Frontier. Now, none of these voluntary conditions directly address merger-specific harms, yet they confer, I think, important public interest benefits. So first, would you comment on whether Frontier would be able to offer these voluntary commitments if this draft legislation were in place as law?

Ms. ABERNATHY. I think if you spoke with Commissioner Copps, for example, with regard to these commitments, he would argue they were merger-specific. I might say maybe not but the way the analysis would go is that the whole reason for the acquisition from a Frontier perspective was for greater scale and scope. The public interest benefit was for greater broadband deployment throughout rural America.

Ms. ESHOO. Yes.

Ms. ABERNATHY. And so some of the commissioners, even though we said that is what we are going to do, they wanted more specific commitments associated with that broadband deployment, which we had said from day one was part of our reason for engaging in the acquisition.

Ms. ESHOO. Well, I support what you did. I think it is terrific. I just was trying to compare and contrast what you did with what is being proposed. Did what is being proposed get in the way of what you did or was it——

Ms. ABERNATHY. I am sorry to interrupt, but I don't think in the context of our specific merger that it would have changed any of the conditions.

Ms. ESHOO. Do you believe in that instance that the public interest standard is preferable to a harms standard?

Ms. ABERNATHY. As opposed to does not create harm to the public?

Ms. ESHOO. Yes.

Ms. ABERNATHY. Versus benefits the public?

Ms. ESHOO. Yes.

Ms. ABERNATHY. I think it is not a huge difference.

Ms. ESHOO. OK. For all of the witnesses, I generally agree that publishing the specific language of proposed rules is a good idea, and as you know, Chairman Genachowski is making this a best practice at the FCC. This now occurs in 83 percent of rulemakings, which is a very significant increase over a previous chairman.

But I am concerned that requiring this in all instances could inadvertently undermine the goals of transparency and efficiency underlying the draft bill. So to all of the witnesses, does this requirement make sense when the Commission places a proposal from outside parties out for comment in a Notice of Proposed Rulemaking?

Mr. SUNUNU. I really think it would depend on the circumstance and the scope of the proposal. Any time you, you know, require a publication or even establish a shot clock, by definition you are requiring another step, you are extending the time frame, and someone is always going to be able to argue that that is making the process more cumbersome.

Ms. ESHOO. Yes.

Mr. SUNUNU. But you have got to balance the need and the desire for transparency with the need or the desire for expediency.

I would also make the observation that any process burden that you establish, whether it is in the name of transparency or fairness or certainty, which are all good things, is going to be as much of a burden for a deregulatory effort as it is for a regulatory effort, at least as far as it is constructed here.

Ms. ESHOO. Thank you. Ms. Abernathy? I don't have very much time left so I do have to speed through the witnesses. Yes, Dr. Cooper?

Mr. COOPER. Well, I want to offer an observation about this question of the opportunity to comment on the actual rules, because I believe that is—in fact, one of the really good definitions of democracy is the opportunity to write the rules under which you live. And in a representative democracy, participation in the process is really important.

The thing that strikes me—and I have said this before in public—is that the problem here is not with the Communications Act or the FCC. It is with the Administrative Procedure Act. This is such a fundamental part of democracy that the implementation of the Administrative Procedure Act has deteriorated to the point where we let agencies deny people the right to speak. And so I would like this problem to be solved. And I said this in my testimony in two ways. One, I think we ought to look at the Administrative Procedures Act and figure out how to make sure that the citizenry gets a chance to participate in the rulemaking.

Second of all, if we want more participation, if we want more flexible and quicker rules—I believe as a veteran of some reg-negs and other multi-stakeholder groups—that the agency needs to reach out and create formal transparent processes where industry and public interest come together to help it. Other people do it. EPA does it, DOE does it, OSHA does it. There is no reason why the FCC can't do it.

Ms. ESHOO. Thank you. Thank you very much.

Mr. TERRY [presiding]. Mr. Shimkus, you are recognized for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman. My mic is really loud so I apologize. I don't usually need it this loud.

For Mr. Sununu, just aside, you mentioned that Congressman Harold Ford was with you. Is that senior or junior? It may dictate how we feel about your testimony. Junior.

Mr. SUNUNU. Junior, another classmate.

Mr. SHIMKUS. Send him our regards, will you?

Mr. SUNUNU. Will do.

Mr. SHIMKUS. I pulled up the organizational chart of the FCC because I always believe that a lot of times structure dictates process. And that even though the structure is determined by the commis-

sioner—in a lot of your opening statements, I don't think you were asked to look at structure—but I would ask you after this hearing if you have comments on structure to get back to us because I do believe that some of these bureaus are established as the Senator said, you know, when there was a quasi-monopoly, 1934, and then we have kind of—like building a home you take out walls, you put a different roof on, you extend. And I have always been amazed at how, with the convergence of technology, that we don't have a convergence of regulation.

And I will give you an example, I think, hopefully. We have no internet bureau. There is no internet bureau so if you are overseas and you are going to call on Skype on a WiFi system, you have no Universal Service Fund, you have no inter-carrier compensation, you have no local taxes, you have last mile issues that aren't compensated for. It just seems to me that if someone doesn't talk about structure, then the policy applications of the regulations—and I don't want to get into big detail because a lot of you didn't talk about structure, and I want to lay that out if you would be some structure—but Mr. May, you have signaled?

Mr. MAY. Well, I would just say briefly I appreciate your concerns. I actually recommended several years ago that the Commission create a broadband bureau, even if it would have subdivisions that still dealt as it would with wireline and so forth. Now, that might be useful. But I just would take the opportunity to say quickly that ultimately to address the issue that you are talking about, Senator Sununu——

Mr. SHIMKUS. Quickly. I am running out of time.

Mr. MAY [continuing]. You need to actually change the act to get rid of the silos that are presently——

Mr. SHIMKUS. I have always been concerned about the silos.

Let me go to Dr. Cooper. I want to confirm that when my colleague, Ms. Eshoo, asked about on the Sunshine applications that you agree that the Sunshine applications in the draft you would support?

Mr. COOPER. I am OK with the Sunshine application as a general proposition. I have two caveats. One, the reporting of those partial meetings, I want transcripts, not summaries. And I want transcripts of ex parte communications, too, because those ought to be fully part of that——

Mr. SHIMKUS. OK. I read your written statement——

Mr. COOPER. Yes.

Mr. SHIMKUS [continuing]. And so when she asked that and you didn't object, I wanted to get——

Mr. COOPER. And I also——

Mr. SHIMKUS. That is fine. I need to go to the next—I have a lot of my friends in—I have been really involved in the presidential Executive order on jobs, which he did in January 2011 and I really would focus this on the EPA, that there should be a cost-benefit analysis and a job on new rules and regulations. The Blue Dog Coalition sent a letter to Chairman Genachowski asking him to at least voluntarily comply with the President's Executive order.

Mr. May, what are your comments on the Blue Dog letter? Have you seen this and do you think that the FCC should do a cost-ben-

efit analysis and a projection of possible job creation activities in the rules and regs?

Mr. MAY. I think it is useful that it does those things, and I think the recent Executive order and President Obama's op-ed suggested as much generally. But I appreciate there may be some exceptions for minor rules and so forth, but in general, it is a useful thing. And here is why just in sum. Because the FCC for most of its history has been oriented around this public interest standard, which is, as we discussed earlier, completely indeterminate, means whatever three commissioners say on any given day. This type of requirement, Congressman, would get the FCC oriented in today's competitive environment to doing the type of more rigorous economic analysis it just hasn't had a history to do or the inclination to do. So it is a useful thing.

Mr. SHIMKUS. Mr. Chairman, my time has expired.

Mr. TERRY. The gentleman from California, Ranking Member Waxman, you are recognized for 5 minutes.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. Levin, I wanted to ask you some questions. I think it was very helpful to have you hear because you are in a unique position looking at these issues from an administrative procedures point of view. You don't come here with any biases about how the FCC has performed and you don't have an agenda before the FCC, so your position is unique and it is, I think, very helpful.

You raise a number of concerns and caution about the potential inflexibility, burdens, and unintended consequences of this bill, and I want to ask you to elaborate a bit on those concerns. What are the risks of moving forward with the approach outlined in the bill?

Mr. LEVIN. With what?

Mr. WAXMAN. The risks. What are the risks of moving forward with the approach outlined in the bill itself?

Mr. LEVIN. Well, I think on particular provisions, it could be too confining to say you have to have an advanced Notice of Inquiry before every proposed rule or Notice of Proposed Rule. You need two of something because sometimes the agency has a pretty good idea of what it is going to do. Rather than have two rounds of discussion with the delay that that would cause, you give the public at least one shot to comment on what the Commission wants to do and that may well be enough. You don't need to build in an automatic second round.

Likewise, you don't necessarily need a reply period if there was no real opposition in the first period or if all the comments came in early in the period. People will have had plenty of chances to reply during the regular comment period. To have a mandatory second period means you are building in a delay for no practical benefit.

Mr. WAXMAN. Let me ask you about the cost-benefit analysis that is required under this proposal.

Mr. LEVIN. Right.

Mr. WAXMAN. You concluded that this kind of scrutiny prior to issuance of highly expensive or consequential regulations may be appropriate, but for routine regulations, such a requirement would not be cost-justified. Expand on that.

Mr. LEVIN. Sure. So compare this with the presidential Executive order, which is the model I think for what the committee intends to do. They say that for all rules you should make a reasoned assessment of the benefits and the costs. Now, in that sense it is just saying think about the plusses and the minuses and I think that is simple. But a true cost-benefit analysis, as we usually use that term, is a rigorous, sophisticated, and expensive analysis with a qualified policy analyst, and the Executive orders limit that to situations where you have a very consequential rule. For a minor rule, it is an overinvestment of resources that agencies can ill afford to squander. And so to that extent I think you have a disproportion between the Executive order model and what the bill contemplates.

Mr. WAXMAN. What do you think about the ability of the Administrative Procedure Act to allow the FCC or any other agency to evaluate the plusses and the minuses, the cost and the benefits?

Mr. LEVIN. Well, one thing to keep in mind—and I think this gets to the thrust of your question—is that an agency will have to analyze the plusses and minuses of the bill anyway because it has to survive a pretty hard look on judicial review. There is also oversight such as this committee provides. They will have to answer the questions. And as far as the APA itself is concerned, they have to write a statement of basis and purpose to explain what they are doing. So to that extent, there is an expectation that they have to address the merits seriously. I don't think you necessarily need to add on to that with an FCC process provision.

Mr. WAXMAN. Yes. What are your thoughts about the idea of this legislation is just focused on one agency? Should we be taking a broader approach with reform proposals where they are needed?

Mr. LEVIN. Well, I have endorsed an experiment with respect to the Sunshine Act, so I don't want to rule out categorically that you might do something agency-specific and see how it works. However, I think if you are going to think about issues of that kind, you should not do something just to improvise. At least you should be very attentive to developed understandings in the administrative law field. And if you are about to do something that departs from it, you should be very cautious and rethink what you contemplate.

Mr. WAXMAN. And then lastly, how does this legislation compare with related recommendations adopted by the Administrative Conference just last week?

Mr. LEVIN. I think in some ways it is parallel but it also, I think, probably is a little stricter. And the final text hasn't been released, but my general understanding of what ACUS will say is that reply comments are good where appropriate, that at least 30 days or 60 days of comments should usually be available but doesn't provide that it should be 100 percent of the time.

Mr. WAXMAN. Thank you.

Thank you, Mr. Chairman.

Mr. WALDEN. Thank you. And I am going to exercise the prerogative of the chair with unanimous consent so we could all recognize one of our staff people, David Rettle, whose wife last week gave birth to their first child, Benjamin David Rettle. We have asked David to submit a photo for the record for this hearing.

Mr. WAXMAN. Reserving the right to object.

Mr. WALDEN. We would hope on at least this matter we could have—no. With that, thank you, and congratulations to David and his wife and the arrival of Benjamin David. There will be other announcements later in the year.

Mr. Barton, we recognize you now for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. We hope that was not an open and transparent process.

Mr. WALDEN. No, it was streamed on video.

Mr. BARTON. Right. Right. Anyway, we want to welcome former Congressman and Senator Sununu, good colleague, good friend, and I also think an engineer before this committee.

I have long been a proponent of FCC reform. I had a bill with several other members of the committee in the last Congress, I have a bill in this Congress, and I plan to be a cosponsor of the draft that Chairman Walden has circulated for comments, so I think this is a good thing, a good day. And I think it is high time. I have a few questions I am going to ask for specific witnesses, but if anybody has a specific comment, feel free to chip in.

The Section 5A, Subparagraph (b), transparency reform that would require the Commission to establish internal procedures to provide adequate deliberation over and review of pending orders, publication of draft orders before open meetings, minimum public comment periods, Mr. Sununu, are you supportive of that?

Mr. SUNUNU. I am.

Mr. BARTON. Is there anybody on the witness dais that is not supportive of that, the transparency issues? Let the record show that everybody seems to be supportive.

What about 5A, Subsection (c), Sunshine reform that would allow three commissioners to meet for collaborative discussions if they do so in a bipartisan manner, which means that it has to be at least one member of each political party in consultations? And they also have to have the Office of the General Counsel to do oversight. Is anybody opposed to that? Mr. Cooper?

Mr. COOPER. I would like a full transcript of any of those meetings as opposed to summary.

Mr. BARTON. OK. I don't have a problem with that. And by the way, Mr. Cooper, it is good to have you back. You probably have enough standing to get a pension from this committee as many times as you have testified, so we are glad that you are back.

Let us see. Let us look at the Section 5A, Subsection (g) refers to shot clocks, which would require the Commission to establish shot clocks for each type of proceeding. Is that generally approved by everybody? OK. It looks like you are doing good, Mr. Chairman.

Mr. COOPER. By shot clocks I have one concern. I want the shot clock to run when the record is complete.

Mr. BARTON. When the record is——

Mr. COOPER. We have had a problem in merger review in which the companies aren't forthcoming into providing the data, and months and months after the shot clock starts we all of a sudden get a big data dump and we get them screaming about how it is taking too long. So I think the Commission should be allowed to build the record first and be comfortable that it has the complete record and then this shot clock should start.

Mr. BARTON. My last question, last minute is Section 5A, Subparagraph (j), the transaction review reform. This would preserve the Commission's ability to review transaction but would require conditions for those transaction reviews to be narrowly tailored to remedy harms that arise as a direct result of the transaction. What is the general review of that?

Mr. COOPER. Well, my testimony I criticized that as unnecessarily undermining the ability of the agency to deal with this dynamic market where mergers change the structure——

Mr. BARTON. So you want to tweak it, you want to eliminate it, you——

Mr. COOPER. I don't believe the standard needs to be changed.

Mr. BARTON. You don't think it needs to be changed?

Mr. COOPER. I don't think it needs to be changed.

Mr. BARTON. This gentleman next to you, Mr. Ramsay, what is your view on that?

Mr. RAMSAY. I just wanted to pipe in here and say I am a government lawyer. I am not allowed to take positions that disagree with my clients, and in this particular case, my clients haven't come to any consensus on that provision, so I haven't either.

Mr. BARTON. Your clients are the——

Mr. RAMSAY. State Public Utility Commissioners, yes, sir.

Mr. BARTON. OK. Mr. Sununu? I mean Senator Sununu?

Mr. SUNUNU. I answer to just about everything.

I think the real issue is the one with regard to the voluntary considerations. And people are frustrated by the fact that at times the Commission seems to have sought out and imposed voluntary considerations—we all know what that means—that are outside their jurisdiction. So this is really as much a question of how to ensure that the Commission stays within its jurisdiction as it is to determine whether or not there should ever be a voluntary consideration or whether the public interest standard is or isn't being misused. It is a question of finding language and finding a process that is consistent and that ensures that the Commission stays within its jurisdictional boundaries. And I think that is what the intention is of this section.

Mr. BARTON. Mr. Cooper, before——

Mr. COOPER. I have proposed a way to deal with that, which is that those conditions should be subject to comment and review, which would expose abuses. And I think that is the way to get at the abuses but also preserve the authority to really deal with the issues that the merger proposes.

Mr. BARTON. OK. Mr. Chairman, I think you have got a winner here. It obviously needs to be tweaked some, but you have worked hard on this and you have listened to a lot of people. I only have a few minor technical changes I wish to suggest, but I hope we can introduce a new bill and move expeditiously to move it through subcommittee into full committee. This is something whose time has come. And I yield back.

Mr. WALDEN. Thank you, Mr. Chairman. I appreciate the good work you and others in this committee have done for many years in this area, and I think we are on the cusp of having good legislation here that does need some tweaks. And we intend to work as best we can in a bipartisan way to get that done.

So with that, now, I would like to recognize the gentleman from Michigan, my friend and esteemed colleague Mr. Dingell, for 5 minutes.

Mr. DINGELL. I thank my dear friend the chairman for this recognition, and I also express my thanks to my dear friend Mr. Doyle who is always kind and generous in his dealings with me. And I would like to welcome back Senator Sununu. Welcome back.

Mr. SUNUNU. Thank you.

Mr. DINGELL. It is good to see you again.

These questions to Professor Levin and Ms. Abernathy. They will require yes or no.

The draft bill requirement says that the Commission will complete an identification and analysis of the market failure that prompted a given rulemaking seems to be a little much. Does the Commission engage in rulemakings that are not prompted by market failures? Yes or no?

Ms. ABERNATHY. Yes.

Mr. DINGELL. Professor?

Mr. LEVIN. Well, I am not an FCC specialist, but I would expect the answer is no——

Mr. DINGELL. Thank you.

Mr. LEVIN [continuing]. That some of them should not relate to market——

Mr. DINGELL. The next question indicates to me that the draft bill's failure analysis requirement has been at least superfluous, or worse, unnecessary in many cases. Am I correct in that feeling?

Mr. LEVIN. The cost-benefit analysis? You are correct.

Mr. DINGELL. Ma'am?

Ms. ABERNATHY. It would be necessary in some situations.

Mr. DINGELL. All right. Now, again, to Professor Levin and Ms. Abernathy, the draft bill seems to require that the Commission perform a cost-benefit analysis on every rule that may impose additional burdens on industry or consumers, is that correct?

Mr. LEVIN. I think that is what it says, yes.

Ms. ABERNATHY. I believe that is what the bill says.

Mr. DINGELL. Now, again, to Professor Levin and Ms. Abernathy, I believe the requirements are, again, overbroad and would require the Commission to devote many of its finite resources to performing such analysis. Do you agree? Yes or no?

Mr. LEVIN. I agree.

Ms. ABERNATHY. I agree. It is overbroad.

Mr. DINGELL. Now, again, to Professor Levin and Ms. Abernathy, further, is it reasonable to assume that the Commission has neither adequate staff nor funding with which to complete the cost-benefit analysis of every rule that imposes additional burdens on industry or consumers? Yes or no?

Mr. LEVIN. It is reasonable to assume the answer is yes.

Ms. ABERNATHY. I don't know.

Mr. DINGELL. OK. Now, if this be the case, it would appear, then, that the Commission would require additional funds in order to comply with the draft bill's requirements, is that correct?

Mr. LEVIN. Presumably.

Mr. DINGELL. OK. Or we might assume that the FCC will be doing more to accomplish less at greater cost, is that an unfair assumption?

Mr. LEVIN. So I would assume.

Mr. DINGELL. OK. Now, this again to the last two witnesses. Finally, I come to the matter of personal interest. In the Congress in the past I have introduced legislation to amend Section 10 of the Federal Communications Act to require the Commission act on a forbearance petition within a year's time. Forbearance as a result of Commission inaction and action that takes place as a result of Commission inaction appears to me to be very bad policy. Now, to all of our witnesses here starting with Senator Sununu, would you support amending Section 10 of the Communications Act as I have just described to eliminate the forbearance that is practiced by the Commission leading to decisions being made by a simple inaction on the part of the Commission?

Mr. SUNUNU. To eliminate the forbearance or to set a time limit of 1 year?

Mr. DINGELL. Well, tell me what you feel. Should we do it where we have to act on it within a year's time?

Mr. SUNUNU. I think any time you can set a clear time frame for action, it is going to add certainty to the regulatory process. I don't know if 1 year is the right amount of time, but certainty in the regulatory process is likely to be a good thing.

Mr. DINGELL. Thank you. Ms. Abernathy, yes or no?

Ms. ABERNATHY. I agree with the additional clarity around the forbearance process.

Mr. DINGELL. Mr. Ramsay?

Mr. RAMSAY. We are on record with agreeing with the concept of shot clock, so I guess the answer is yes.

Mr. DINGELL. Mr. Cooper?

Mr. COOPER. Justice delayed is justice denied but it needs to be worked both ways. So when complaints are pending at the Commission, they languish for years. If you are going to have a shot clock, it ought to be both to the favor of the public and the——

Mr. DINGELL. Well, maybe we ought to fire the damned Commission if they can't come to a decision on these matters or give them more money.

Let us see. Mr. Levin?

Mr. LEVIN. Well, I don't do FCC law but administrative law authorities generally are skeptical about Congress imposing too many statutory deadlines because the upshot may be that those deadlines will drive the process more fully than——

Mr. DINGELL. Well, let us not debate that but it seems like poor sense to have the Commission just simply saying we haven't acted so it is going to become the rule or it is going to become law or it is going to become the regulation. That appears to me to be very bad. Do you agree?

Mr. LEVIN. I am sorry. Could you repeat that?

Mr. DINGELL. Well, the Commission just sits around and twiddles its thumbs, nothing happens, and then all of a sudden, we have a new rule. It doesn't seem like good sense to me. Does it make sense to you?

Mr. LEVIN. I think they should proceed expeditiously. I think the idea of establishing deadlines for themselves is good, but if we are talking about legally enforceable deadlines, you often have too much control by outsiders.

Mr. DINGELL. Thank you. My time is limited. Next witness?

Mr. MAY. I disagree with your proposal because it shifts the whole forbearance thing around. It was included in the act to be deregulatory and that is why the provision says if——

Mr. DINGELL. Thank you very much.

So Mr. Chairman, I say this with respect. If our intention here is to focus on process reform, I would urge you to be done deliberately, transparently, and with adequate participation of all affected parties. And after all, we should avoid the mistakes of the agency that we seek to reform. Mr. Chairman, your courtesy is appreciated and I thank you.

Mr. WALDEN. I thank the gentleman from Michigan and now I turn to the gentleman from Ohio, Mr. Latta, for questions. I made a mistake. Ms. Blackburn.

Mrs. BLACKBURN. That is quite all right. I know I am hard to see over here.

I want to stay on this issue of forbearance. And Mr. May, I want to come to you because you have talked about the reforms that are needed in Section 10 and then regulatory review, the periodic reviews that are needed in Section 11. And I appreciated your comments. And so why don't you elaborate a little bit on how including evidentiary presumption to forbearance, how it would enhance the likelihood of the Commission in reaching a deregulatory decision? Because I think that as we look at reform, this is going to be a key nugget for us.

Mr. MAY. Thank you, Representative Blackburn. Here is the deal in a nub. These two provisions—forbearance and regulatory review, if you look at them—were clearly put into the '96 Act to be used as deregulatory tools. That is evident on the face of those provisions. The fact is they have only been used very sparingly by the Commission. They haven't accomplished much deregulation, even as the market has become much more competitive. So I think the Congress through a pretty modest fix could address that situation in this way, not by changing the substantive criteria that are in the forbearance and regulatory review provisions. But again, when you look at them, they are addressed to the development of a competitive market. It doesn't change the substantive criteria.

But I would add a sentence that essentially says that enacting on a petition or in doing the regulatory review proceeding, unless the Commission can find by clear and convincing evidence that the criteria have not been met, that it shall presume that the rules should go away. So again you are not changing the criteria but you are adding an evidentiary presumption.

Because you ought to wonder why these two provisions, which are unique—I think even Professor Levin, who has looked at other agency statutes, for many years I have challenged anyone to find another forbearance provision like this in another statute and no one has done that like this. It seems me if the provision is there, you ought to make it useful. And you could do it by just that shifting an evidentiary burden.

And to me this is the most important thing the committee could do. And it does fall in the realm—it is sort on the line between substance and process in a way, but it should be done, I think, if the committee wants to address the situation of existing regulations because your draft principally addresses regulations going forward.

Thank you.

Mrs. BLACKBURN. Thank you. Let me reclaim my time. And I have got a couple of yes or no questions that I want to give to each of you.

Commissioner McDowell gave quite a hefty statement calling for a "full and public operation financial and ethics audit" of everything connected to the FCC. Mr. Sununu, starting with you, yes or no, do you support having that full audit, all the way down the line?

Mr. SUNUNU. I think as a matter of fact it is good policy.

Mrs. BLACKBURN. OK.

Ms. ABERNATHY. I agree. It is good policy.

Mrs. BLACKBURN. OK.

Mr. RAMSAY. NARUC has no position.

Mrs. BLACKBURN. Pardon me?

Mr. RAMSAY. My association has not taken a position on that.

Mrs. BLACKBURN. No position, OK.

Mr. COOPER. As far as I can tell, the FCC is no better or worse than any other agency. The inspector general and the laws of the United States cover the problems, so I say no.

Mrs. BLACKBURN. So you would say two wrongs make a right? OK. Professor?

Mr. LEVIN. I am not an FCC authority. If I had to stake out a guess I would probably give an answer like Mr. Cooper's.

Mrs. BLACKBURN. OK. Mr. May?

Mr. MAY. I think it is a good thing to do. Not every year necessarily but it wouldn't be a bad thing to do.

Mrs. BLACKBURN. OK. One "no" position, two waffled and three "yes," so I will take that. But remember, these are yes-and-no questions. All right. One more, yes or no. OK.

Do you think that Congress should be in the position of defining the role for the FCC and telling the FCC what to do or should the FCC continue doing what they are doing right now, which is trying to tell Congress what to do? Mr. Sununu, yes or no?

Mr. SUNUNU. Well, it is absolutely a congressional prerogative——

Mrs. BLACKBURN. OK.

Mr. SUNUNU [continuing]. And again, in my opening statement, I think that in addition to this draft legislation, we need to look more broadly about the underlying premise of the '34 Act, the '96 amendments, and view this as a competitive world first and not as a natural monopoly.

Mrs. BLACKBURN. OK.

Ms. ABERNATHY. Yes, Congress defines the scope of the FCC's authority.

Mrs. BLACKBURN. Thank you.

Mr. RAMSAY. Yes, Congress defines the scope of the FCC's authority and can tell it to a justice——

Mrs. BLACKBURN. Thank you.

Mr. COOPER. Congress did that in the '96 Act.

Mrs. BLACKBURN. OK.

Mr. LEVIN. Yes, Congress should set the bounds of the Commission's actions but it should give discretion to the Commission for things that require more flexibility than Congress can get around to addressing in specific terms.

Mrs. BLACKBURN. OK. Mr. May?

Mr. MAY. Yes.

Mrs. BLACKBURN. OK. So we have got four that say "yes," one that gives a little bit more—one I think is uncertain. So I thank you all. Remember, yes or no, you did fairly well for being here in Washington and limiting your words even though you couldn't give me a yes or a no.

And I yield back.

Mr. WALDEN. I thank the gentlelady for her questions. And I turn now to the gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

I am very concerned about this section of the draft that requires the Commission to issue a Notice of Inquiry for every single proceeding. I think in some cases this could cause serious harm to consumers and the public safety, and I would urge my colleagues to think back, for example, to the proceedings a few years ago when VoIP customers couldn't make 9-1-1 calls, and the FCC needed to act quickly to enact E-9-1-1 rules. This is just one example. Another might be the rules required to implement the legislation we just passed to expand low power FM radio, which the Commission is currently working on.

And I know that Professor Levin has already voiced his opinion on this, but I would just ask for the rest of the panelists, given these concerns, is there a strong enough reason to require NOIs for every single proposed rulemaking? Why not just leave this up to the FCC? If we could just go down the line.

Mr. SUNUNU. I have to believe there is an in between. I think as a matter of policy, the Notice of Inquiry is a good idea. There certainly may be examples either in the past or hypothetical where it might not be the ideal situation, but it is important if you are going to make exceptions to define those circumstances and those exceptions as clearly as possible. I mean you defeat the whole purpose if you just say, well, the FCC can decide because you are going to have less clarity and less definition in the process.

Mr. DOYLE. Ms. Abernathy?

Ms. ABERNATHY. I think an NOI as written is overly broad and so it should be circumscribed to some degree so that you don't waste resources and create delays. But I think in concept it is a good idea for many proceedings.

Mr. DOYLE. Mr. Ramsay?

Mr. RAMSAY. I agree with actually the statements of both of the people that preceded me. I believe that, you know, typically a rush to judgment means you ran too fast, so I like the concept of having a Notice of Inquiry in most instances. I would note that in emergency circumstances, the APA allows the Commission to bypass even a Notice of Proposed Rulemaking. So in those circumstances, there is already a mechanism. But the question is how to set the

standard as Mr. Sununu said for when you don't have to do the NOI, which is not an easy thing to address.

Mr. WALDEN. Will the gentleman yield for a second?

Mr. DOYLE. Yes, sure.

Mr. WALDEN. On page 3 of the draft, we incorporate that APA emergency exemption. So I would draw your attention to that. And on the second page, if they have done an NOI, and NPRM or a Notice or Petition for Rulemaking within the last 3 years, that qualifies.

Mr. RAMSAY. But it still requires two rounds of comment?

Mr. WALDEN. No, you don't require——

Mr. COOPER. There is an "or" in that paragraph. The first paragraph says "or" as far as I can tell. And so maybe I have misread it. And it is really important that we get this right because I believe in the opportunity to comment. But I don't think it is necessary for two rounds of comment. If the agency proposes a rule and builds a record, then that meets this. And I see that "or." It says "one or the other," so it doesn't say a Notice of Inquiry and these others. It says "or." Now, maybe there is someplace else in here where we get the impression of the "and," but it is an "or."

Mr. WALDEN. Yes. Mr. Levin?

Mr. LEVIN. Well, the chairman is correct that the bill as written exempts the true emergency situations where you can proceed with no notice and comment. But that having been said, we should also think about situations where there is some urgency about getting just the basic notice and comment done and having two rounds of comment is unwarranted. So you should leave some flexibility to say we don't need advanced notice in this particular situation. The public still gets one shot at commenting and saying it is a bad idea, change it, et cetera. But you don't need the extra round and sometimes that would be imprudent.

Mr. DOYLE. But I guess the trick is how do you write that into the bill? Mr. Sununu brings this up that, you know, do we just leave this at the discretion to the FCC or is there a way to create some language that would allow it to happen what you have just suggested?

Mr. LEVIN. I think it needs some consideration, but one idea I suggested in my draft is that you might set up the procedure and say the agency can, for good cause, bypass it. And that term is usually read to me—and a very good cause, not because you feel like it.

Mr. DOYLE. Sure. Mr. May?

Mr. MAY. Yes, just briefly. This is a provision I am generally not in favor of in the draft for a lot of the reasons that Professor Levin talked about. But here is what should happen. The reason it is here I think is because the FCC, especially in recent years over all commissions, it started to draft Notice of Proposed Rulemakings in a much more open-ended way than it used to back when I was at the Commission a long time ago. And it is, I guess, responding to that. But it is likely to increase the time that the FCC could act on things that it does need to act on.

Remember I talked about Chairman Powell saying that the Commission needs to be able to act in internet time. So this is I am not sure the right way to get at that. Maybe just if your oversight

would get the FCC focused on drafting rulemaking proposals that actually propose specific things, if not precise rule language.

Mr. DOYLE. Sure. Thank you, Mr. Chairman.

Mr. WALDEN. Thank you, Mr. Doyle.

We go now to Mr. Scalise for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman.

It was brought up earlier that a lot of us have concerns. I want to put some real structure in place for the FCC, not just for clarity in the industry, but also to move it away from what many of us view as an agency that is starting to implement their own political agenda as opposed to an agency that should be focused on regulations as it applies to existing law.

I want to ask—and I want to start with Mr. May—when we look at some of the mergers that have come through recently, and of course there are still mergers pending for the FCC, there is a provision here in Section J of this draft that says, "The Commission may not consider voluntary commitment of a party to such transfer or transaction unless the Commission could adopt that voluntary commitment as a condition under Paragraph 1." Let me ask you, you know, in your experiences from what you have seen with some of these conditions that have been placed on mergers at a time where companies really are very vulnerable to some of the pressures that would be put in place to agree to something that they might not otherwise support in those preconditions place as a condition of a merger, if you can address that in general but also as it relates to what you are seeing here in the language in the draft?

Mr. MAY. Well, I think the language in the draft is good and I am enthusiastic about this provision. I said in my opening statement I would actually like to see the merger review process reformed even further. But this is useful because what it does is at least try and put some constraints on the FCC from going too far afield by tying the FCC's extraction of voluntary commitments to conditions that are narrowly tailored to remedy a harm that arises as a direct result of specific transfer or specific transaction. Now, there can still be disputes about that, but you know, at least that does confine it and that is a useful thing.

The problem right now—and this is why this is so important—the only constraint right now is the public interest standard. And the public interest standard, of course, is completely indeterminate. And I can think of mergers where the FCC has imposed a condition or there has been a voluntary commitment offered not to outsource jobs overseas, for example, in one merger. Well, that might be a nice thing to happen as a policy but it didn't have anything at all to do with that particular merger at all. And there had been examples like that. And it gives the process an unseemly flavor when at the last minute, 2 days before a merger, you see, you know, voluntary commitments offered up like this.

Mr. SCALISE. And how about as it relates to the entire industry, too, because there are some conditions that, you know, maybe currently or in the past that have been placed that don't just affect the entities involved in the merger but also could be impacted industry-wide?

Mr. MAY. Well, that is true and it also, of course, happens the other way around sort of perversely that you can have a condition

imposed extracted by the FCC—and I am using the word extracted because, again, these things generally happen at the last minute—where a condition that ought to be industry-wide, imposed on an industry-wide basis if at all if it is going to be imposed—one party, the party to the merger is now subject to it and that seems not to be really equitable.

But then what happens is often that condition sometimes is then used going forward by the FCC as a proposal then to apply to the whole industry so it becomes a bit of a precedent if not a legally-binding——

Mr. SCALISE. Right. And I think again that is a good condition because it is a problem we have seen, we have heard about, but it has actually been implemented and is probably still being used today in some of the others.

I want to ask Ms. Abernathy a question as it relates to the annual reports. We have heard a number of complaints that the annual reports at the FCC has to comply with today, by the time they are filed, they are outdated. It takes a whole lot of work to put in and then they are filed and really not that useful. This draft and its Section K really lays out a different process of putting a communications marketplace report in place that might be a little more conducive to the changing technologies. If you can maybe address both what you are seeing in the draft but also as it relates to the current practice of these annual reports and whether or not they are even useful.

Ms. ABERNATHY. I think if you implement new reporting obligations and eliminate some of the old ones, then that makes a lot of sense because, again, some of the reports were built around the old silos. And so the information, it takes a lot of time and money to gather the information, and yet it probably isn't providing a great deal of beneficial competitive analysis for Congress. So I think there has got to be a better reporting way, and this is a proposal that I think would start you in the right direction.

Mr. SCALISE. Mr. Sununu?

Mr. SUNUNU. I am sorry. If I could make an observation on that point, though. The language that is here in the Communications Marketplace section identifying challenges and opportunities in the marketplace, the jobs, and economy, frankly it begins to make the FCC sound like an economic development group and that is simply not what it is. I think perhaps what we are trying to get at here is that the Commission should be more focused on evaluating the competitive state of the marketplace, the number of players, price trends, new products, innovation in the space, and taking that into consideration in their regulatory and rulemaking process. So I might encourage you to look a little bit more carefully at that language in order to (a) avoid unintended consequences and avoid creating new areas for the FCC to engage in regulation and instead focus it on making sure that we have got a regulatory authority focused on the current competitive state of the marketplace.

Mr. WALDEN. We appreciate that.

Mr. SCALISE. We appreciate your comments and yield back, Mr. Chairman.

Mr. WALDEN. Thank you. We do have a vote on in the House floor but we should have time for Mr. Latta for 5 minutes.

And as he prepares, I would really appreciate as you have heard the discussion among yourselves and with us, if you have specific recommendations for improving the language in the bill that are not referenced in your own testimony, it would be most helpful to get that to us as soon as possible. Thank you.

Mr. Latta?

Mr. LATTA. Well, thank you, Chairman. I really appreciate you holding the hearing today and all the panelists for being here. We really appreciate your time. And I also appreciate the chairman's discussion draft that I think is very, very important.

We all have lots of folks coming through our office all the time talking about what is happening out there. And you know, the FCC is no different from what I have heard from a lot of different folks in that we have to really go in and look what is happening there because it could be stifling businesses out there. And one of the things I have done—I have also got a bill out there for cost-benefit analysis for the FCC when they are promulgating rules and at the very beginning and also at the final rule.

And the things that we have heard that they are looking at across—either with those cost-benefits would be that either would or should the FCC consider the costs—or largely the costs of businesses of complying with the new regulatory regime, i.e., creating new compliance regime, training employees, changing, billing other back-office systems, the lost revenue that businesses could be—would be lost for the new prohibited—engaging in particular business models that would be prohibited under the new regulation and the cost of productivity in the businesses.

And one of the things, if I may, Ms. Abernathy, if I could ask you first is in your unique role as a former FCC commissioner and also at Frontier what you would see would be able to comment on this idea from, you know, the FCC's perspective and also from Frontier if they would have to do a cost-benefit analysis.

Ms. ABERNATHY. I think it is appropriate for a number of proceedings to engage in a cost-benefit analysis because at the end of the day if the costs drive up our cost to consumers and the overall incremental information that is potentially provided to the FCC is de minimis, that makes no sense. And sometimes what happens in the context of looking at various rules and regs is the commissioners have the best of intentions but they haven't really thought through the costs and the burdens on the industry. And it is backwards. And so I think it would make a big difference.

Mr. LATTA. Let me ask you this. Looking at what has happened in the recent past with the FCC, could you comment on any more recent rules that would have benefitted from a cost-benefit analysis?

Ms. ABERNATHY. I could get back to you in writing afterwards just because I need to look back.

Mr. LATTA. I appreciate that.

Mr. May, I know in your testimony that you have addressed on page 2, your last paragraph there that, you know, you said in there taking them generally in order that they appear in the bill draft, and especially those provisions that would require the agency—you go on to also state to perform a cost-benefit analysis. If could just

get your read on that a little bit farther on the cost-benefit analysis.

Mr. MAY. I think generally this would be a good requirement to impose on the FCC. I take Professor Levin's point that it is worth thinking about whether it should be for every rule, and the answer is it may not be. But there is a lot of economically significant rules that the FCC proposes. Now, I think of Bill Shock, Net Neutrality, you know, the Data Roaming bill it just did. All of those are the types of rules that have cost and benefits and I think the FCC—obviously it does some of this now, but as I said earlier, because historically it has tended to focus, you know, again, in 103 places it has authority to act in the public interest. And because that is so indeterminate, it has, in my view, a bit of—with respect to all past commissioners—it has got a bit of a mindset, to think of things in a way that is not economically as rigorous as it should be in today's environment, which is at least increasingly competitive, fast-changing marketplace environment.

Mr. LATTA. In my remaining time, Mr. Ramsay, I know on page 7 of your testimony today that you state that "Still, logically, an analysis of a rule's potential benefits and costs, as well as milestones for its review, could focus available resources and expertise on the efficacy of any proposed rule." And just any other comment on cost-benefit analysis?

Mr. RAMSAY. The only thing I said on my testimony is true is that the nature of regulation and the nature of regulatory oversight is a balance of competing interests. The APA already requires agencies to specify the basis and explain why they are doing things. We haven't taken a specific position on the application of a strict cost-benefit test, so I can't speak to that. But I think I also noted in my testimony that it is certainly consistent with Executive orders dating back to, I think, Gerald Ford.

Mr. LATTA. Thank you very much, Mr. Chairman. I see my time has expired, and I yield back.

Mr. WALDEN. Mr. Latta, thank you for your participation in the hearing. I want to thank all of our subcommittee members for their participation, especially thank our panelists. You have been most enlightening for all of us as we work to improve this draft. And as I said, I really would appreciate any specific recommendations on how to make this better and more workable.

So with that, we thank you again and this hearing is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS

Here we are 15 years after the '96 telecom act and technology has advanced beyond what any one of us could have possibly imagined. Yet the laws governing these industries have lagged way behind and many are no longer relevant to the new services and technologies that have arisen over the past few years. That is why I believe this draft legislation is an important first step.

This draft is quite similar to a bill Mr. Barton and I introduced in the previous Congress. Since then, I have introduced H.R. 2102, the FCC Commissioners' Technical Resource Enhancement Act, to allow each Commissioner to hire an electrical engineer or computer scientist.

Equipping the FCC with both legal and technical advisors should provide Commissioners with the necessary staff experience to tackle increasingly complex tech-

nical matters. I hope my colleagues will join me with this initiative and that this bill can be apart of the reform discussion.

FCC Reform and the Future of Telecommunications Policy

Philip J. Weiser*

"We are in danger of becoming prisoners of our own procedures in the administrative process." Newton N. Minow, FCC Chair, 1961-63[1]

The institutional failings of the FCC have finally begun to attract attention. For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of whether and how to reform the FCC's institutional processes. To that end, both House Commerce Committee Chair Emeritus John Dingell and Senate Commerce Committee Chair Jay Rockefeller have expressed serious concerns about how the agency operates,[2] the House Commerce Committee majority released a report citing serious failings in the operations of the agency,[3] and law professor Lawrence Lessig has called for its abolition.[4]

In response to the Congressional interest in institutional reform, the soon-to-be former Chairman Kevin Martin has disclaimed the need for any legislative action, has adjusted some of the FCC's operating procedures, and, in the main, has defended the agency on the ground that his tactics are similar to those of his predecessors.[5] Whether or not Martin's management style is

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* Professor of Law and Telecommunications, University of Colorado at Boulder. Thanks to the Ford Foundation for a grant to support this research and to Dan McCormick on first rate research assistance as well as to Mark Cooper, Pierre de Vries, Kyle Dixon, Ray Gifford, Dale Hatfield, Mike Marcus, Jonathan Nuechterlein, Adam Peters, Jonathan Sallet, Cathy Sharkey, Jim Speta, and Joe Waz for valuable comments and encouragement.

[1] Newton Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146, 153 (1963).

[2] Letter from John D. Dingell, Chairman, House Comm. on Energy and Commerce, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm. (Dec. 3, 2007), *available at* http://energycommerce.house.gov/Press_110/110-ltr.120307.FCC.Martin.transparency.pdf ("Given several events and proceedings over the past year, I am rapidly losing confidence that the Commission has been conducting its affairs in an appropriate manner."); Ted Hearn, *Watching the Martin Watch*, MULTICHANNELNEWS, Jan. 21, 2008, http://www.multichannel.com/article/CA6524092.html (calling on the Senate to evaluate the "structure of the agency, its mission, the terms of the commissioners, and how to make the agency a better regulator, advocate for consumers, and a better resource for Congress").

[3] COMMITTEE ON ENERGY AND COMMERCE MAJORITY STAFF REPORT, DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J.MARTIN (December 2008), http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf [hereinafter, DECEPTION AND DISTRUST].

[4] Lawrence Lessig, *Reboot the FCC*, NEWSWEEK.COM, December 23, 2003, http://www.newsweek.com/id/176809.

[5] John Eggerton, *Martin: FCC Doesn't Need Major Reform*, BROADCASTING & CABLE, Jan. 15, 2008, http://www.broadcastingcable.com/article/CA6522942.html (quoting Martin as stating that "[i]n general, our processes aren't any different than they were under previous chairmen both Republican and Democrat."). Some longtime agency observers essentially second Martin's judgment, noting that "[t]he FCC needs to reform and it has needed to for 25 years. . .Too much is done behind closed doors secretly and it has been that way through Democratic and Republican leadership." Cecilia Kang, *FCC Chair Abused Power, House Probe Finds*, WASHINGTON POST, December 12, 2008, at D1, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/09/AR2008120903132_pf.html (quoting Consumer Union's Gene Kimmelman).

different from past agency Chairs, the great weight of opinion is that the FCC has always operated in a suboptimal fashion and is in dire need of institutional reform. As former Commissioner Glen Robinson noted over forty years ago: "[f]ew agencies of Government have been so doggedly pursued by critics as the FCC."[6] Former Chairman Reed Hundt added his own damning observation: that the agency suffers from a perennial "reputation for agency capture by special interests, mind-boggling delay, internal strife, lack of competence, and a dreadful record on judicial review."[7] In short, the question is not whether to reform how the agency operates, but how to do so.

As new leadership moves to take the reigns at the FCC, it is an opportune moment to re-evaluate the agency's institutional processes. In confronting the challenges facing the agency, the new leadership should not make the mistake of focusing solely on the substantive issues begging for attention—spectrum policy reform, network neutrality, and universal service policy to name a few. Rather, it should also take stock of its institutional processes, as they fundamentally shape the ability of the agency to be an effective regulator in the public interest.[8] In short, the agency's current lack of data-driven decision-making and emphasis on political dealing hinders the thoughtfulness of its analysis, limits its ability to address issues effectively, and invites a cynical attitude toward government.[9] Unfortunately, legal scholars have not done their part to address the institutional failings of the FCC (and other administrative agencies, for that matter), glossing over the importance of institutional processes in favor of substantive policy analysis and generally

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[6] Glen O. Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform*, 53 MINN. L. REV. 1179, 1239 (1969).

[7] Reed E. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L.J. 1, 31 (2006).

[8] In explaining his commitment to a serious evaluation of the Federal Trade Commission's institutional processes (as part of an "FTC at 100" study), Chairman Bill Kovacic explained that "[t]he quality of institutional design, institutional infrastructure, and institutional process has a great deal to do with determining the quality of substantive outcomes. The same energy that's dedicated to asking what's the right doctrine or what's the right conceptual framework has to be applied to questions concerning optimal institutional design and operational arrangements." *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, ANTITRUST SOURCE 1 (August 2008), http://www.ftc.gov/speeches/kovacic/2008kovacicintrvwc.pdf.

[9] Jim Puzzanghera, *Criticism of the FCC's Chairman is Widely Aired*, L.A. TIMES, Dec. 10, 2007, at C1 ("Critics have complained that important issues – such as the 2009 transition to digital television and reforming a fund that subsidizes phone and Internet service for low-income and rural residents – are taking a back seat to bickering."). The often cavalier attitude toward regulation was described and bemoaned by Judge Posner as follows:

> There has I think been a tendency of recent Administrations, both Republican and Democratic but especially the former, not to take regulation very seriously. This tendency expresses itself in deep cuts in staff and in the appointment of regulatory administrators who are either political hacks or are ideologically opposed to regulation. (I have long thought it troublesome that Alan Greenspan was a follower of Ayn Rand.) This would be fine if zero regulation were the social desideratum, but it is not. The correct approach is to carve down regulation to the optimal level but then finance and staff and enforce the remaining regulatory duties competently and in good faith. Judging by the number of scandals in recent years involving the regulation of health, safety, and the environment, this is not being done.

Richard Posner, *Re-Regulate Financial Markets?*, THE BECKER-POSNER BLOG, Apr. 28, 2008, http://www.becker-posner-blog.com/archives/2008/04/reregulate_fina.html.

focusing on the purely legal issues of administrative law as opposed to the actual operations of administrative agencies.[10]

This Article proceeds in five parts. Part I briefly describes the longstanding criticisms of how the FCC operates, highlighting a few recent episodes that have drawn attention to the need for institutional reform. Part II discusses the opportunity for the FCC to adopt a new institutional strategy for telecommunications policymaking, emphasizing the importance of strategic agenda setting and transparency. Part III explains how the agency can use its policymaking tools—rulemaking, adjudication, and merger review—more effectively. Part IV underscores the opportunity for the agency to upgrade its collection and dissemination of data as well as its involvement of the public in its decision-making processes. Part V offers a short conclusion.

I. Background

A. The FCC In Historical Perspective

The FCC has long used suboptimal procedures and processes. These failings are not, however, due merely to shortcomings in leadership. Notably, the agency's early leaders often were influenced by the need to make the inherently political judgments of assigning control over radio frequencies through command-and-control regulation. In particular, the agency took as its mandate the need to evaluate which particular firms or individuals were best suited to hold licenses to use the radio spectrum. In some cases, this power was famously used to benefit those with political connections—including then-Congressman Lyndon Johnson's wife[11]—and, in other cases, it led the agency to make judgments about the relative importance to the U.S. economy of different activities (such as livestock breeding as opposed to dairy inspection).[12] In all cases, the agency was limited in its ability to use judicial-like processes because, as noted economist Alfred Kahn put it, "[t]he dispensation of favors to a selected few is a political act, not a judicial one."[13]

The agency's culture was shaped by the philosophy that emerged from regulating natural monopolies and an often implicit partnership between the regulated parties and the regulator. As former FCC Chairman Reed Hundt put it, the old tradition embraced monopolies "as the best market structures to deliver universal and high quality communications services, such as telephony or video."[14] In the assessment of Judge Posner, this model of regulation involved a cozy relationship between the two parties not necessarily because the regulator was captured or

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[10] Unfortunately, the complaint of law professor and former FCC Commissioner Nick Johnson lodged over a quarter century ago still holds: "[r]ather than seeking methods for improving the administrative process to avoid unsound, unfair, and arbitrary decisions, scholars have focused almost exclusively on the role of courts in supervising and reviewing agency action." Nicholas Johnson, *The Second Half of Jurisprudence: The Study of Administrative Decisionmaking*, 23 STAN. L. REV. 173, 173 (1970) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)) [hereinafter, *Administrative Decisionmaking*].

[11] ROBERT A. CARO, MEANS OF ASCENT __ (1991).

[12] Petition of Lehigh Cooperative Farmers, Inc., 10 F.C.C.2d 315 (1967) (selecting best applicant for a radio license based on value of relevant occupations).

[13] THOMAS K. MCCRAW, PROPHETS OF REGULATION 286 (1984). For many years, the FCC attempted to justify its use of comparative hearings as to who received a broadcast license as a principled enterprise. Ultimately, however, former FCC Chair Newt Minow captured the prevailing conclusion in stating that "it is largely true that the Commission has failed to develop any coherent policy in the comparative field. Almost every student of the Commission has reached this conclusion[.]" Minow, *supra* note 1, at 148.

[14] Reed Hundt, Chairman, Fed. Commc'ns Comm., Speech at the Center for National Policy (May 6, 1996), *available at* http://www.fcc.gov/Speeches/Hundt/spreh624.txt.

subject to political forces. Rather, as Posner saw it, the regulatory regime allowed (or even encouraged) the interests of the regulator to become intertwined with the conduct of the regulated firm that participated in a program—such as the protection of universal service—that he called "taxation by regulation."[15]

The FCC's legacy of command-and-control regulation and political favoritism has often steered the agency towards *ad hoc* judgments and away from any principled framework for evaluating alternative courses of action. Almost forty years ago, FCC Commissioner Nicholas Johnson summed up this legacy in bemoaning that "[t]oo often decisions are the product of an *ad hoc* disposition reigning in the absence of any clearly articulated standards for spectrum allocation and utilization priorities."[16] In reviewing spectrum management by the Commission of the 1960s, Johnson offered criticisms that could be made of today's Commission, highlighting "the need to view spectrum problems as a whole; the need to anticipate and plan for future spectrum requirements; and the need to obtain better and more complete data on the use of the spectrum."[17]

The FCC of Commissioner Johnson's day, like today's Commission, is one where alternative regulatory strategies and a holistic perspective on policymaking are often constrained by the practice of viewing issues in isolation without any strategic direction or focus. In some respects, the Commission has adopted the most limiting aspects of the judicial process—reacting mostly to matters that come before it—as well as the most unfortunate aspect of legislative processes—engaging in political deal-making and rewarding those with influence. In theory, of course, the Commission could combine the best of both traditions—drawing on the judiciary's legacy of impartiality and data-driven decision-making and the legislative branch's ability to view issues in a broad and strategic manner. Unfortunately, as Commissioner Johnson noted, the FCC generally fails to utilize any of its own insights or independent research, relying "almost exclusively upon information and analysis supplied by" the parties that appear before it.[18]

The FCC's limited strategic planning and its tendency to engage in *ad hoc* decision-making are perennial points of criticism. In 1949, former President Herbert Hoover—who (as Commerce Secretary) was largely responsible for the establishment of the Federal Radio Commission that evolved into the FCC—led a commission that concluded that the FCC had "failed both to define its primary objectives and to make many policy determinations required for efficient and expeditious administration."[19] In a similar vein, Professor Landis, who helped President Roosevelt develop the basic architecture of the modern administrative state, authored a report for President Kennedy that excoriated the FCC for being "incapable of policy planning, of disposing within a reasonable period of time the business before it, [and] of fashioning procedures that are effective to deal with its problems."[20] Despite such criticisms, the FCC's practice of *ad hoc* decision-making has remained largely intact.

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[15] Richard A. Posner, *Taxation By Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971); *see also* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 335 (1974).

[16] Nicholas Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROBS. 505, 512 (1969).

[17] *Id.* at 528. For my own suggestions for spectrum policy reform, see Philip J. Weiser, *The Untapped Promise of Wireless Spectrum* (The Hamilton Project of the Brookings Inst., Discussion Paper No. 2008-08, 2008), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/07_wireless_weiser/07_wireless_weiser.pdf.

[18] Johnson, *supra* note 16, at 530.

[19] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, TASK FORCE REPORT 95 (1949).

[20] JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (1960)

To underscore the limitations of the FCC, Commissioner Johnson pointed to a landmark proceeding that authorized domestic satellites. This proceeding, while seemingly obscure to many of today's observers, led to a revolutionary form of communications that has transformed an array of communications technologies (from video programming to cell phones to international voice communications). Johnson explained that this proceeding did not emerge from a strategic assessment of technological possibilities and how the Commission could advance their development, but rather from a proposal shaped by AT&T. Consequently, the FCC approached that matter by heading down the road of granting the request without carefully rethinking the appropriate regulatory strategy. Fortunately, as Johnson described it, "[t]he Ford Foundation subsequently filed a proposal that radically changed the frame of reference in which the question was being discussed—including the concept of a 'people's dividend'" from the massive investment that followed the FCC's decision.[21] That concept, in short, led to proposals for funding for the Public Broadcasting Service that, but for the Ford Foundation's intervention, the Commission would have overlooked.

For another case illustrating the costs of relying on telecommunications companies as the agenda setter at the FCC, consider the decision to authorize cellular telephone service. Like domestic satellite service, the proposal stemmed from a request by AT&T, which sought the sole authority to deploy such a service. Significantly, AT&T's incentive to roll out the service was dulled by its status as a dominant firm evaluating a potentially disruptive technology—i.e., it was skeptical that the technology could succeed, it did not believe there would be a huge market for it, and it worried that wireless services might ultimately pose a threat to its landline operations.[22] Consequently, neither the FCC nor AT&T pushed the matter aggressively, meaning that the authorization was "slow rolled," costing American consumers, on one account, $33 billion in lost productivity gains.[23]

In addition to failing to set its own agenda, the FCC often fails to address issues in an intellectually defensible and careful manner. One notable and famous such case arose from the agency's re-evaluation of the financial interest and syndication (finsyn) rules, which restricted the ability of broadcast networks to participate in the production of TV programming. Originally, these rules were seen as providing important protections for independent TV producers, but over time, it increasingly appeared that they served to protect the Hollywood studios (which fought for the preservation of the rules) from competition by the networks that were eager to create their own programming development arms. When it decided to keep the rules in place, the FCC wrote a long opinion that Judge Posner, in overturning it on appeal, famously remarked was "like a Persian cat with its fur shaved, [] alarmingly pale and thin."[24] To that zinger, he added that "[t]he impression created [by the agency's opinion] is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring supplicants who have somehow to be conciliated."[25]

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[21] Johnson, *supra* note 16, at 530.

[22] The dulled incentives of AT&T in this case are consistent with the dynamics described in CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

[23] Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, MICROECONOMICS 23 (1997).

[24] Schurz Comm, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

[25] *Id.*

In evaluating the above proceedings and the Commission's legacy, some former FCC officials have concluded that the agency is prone to "capture" by the interests it regulates. Former Chair Reed Hundt, for example, suggested that the acronym "FCC" stands for "Firmly Captured by Corporations"[26] while former FCC Chief Economist Tom Hazlett counters that "FCC" stands for "Forever Captured by Corporations."[27] To my mind, the challenge is not so much the classic portrait of agency capture (e.g., the revolving door) or even the more subtle version of the intertwined interests model (i.e., taxation by regulation) advanced by Posner. Rather, because the agency operates with limited imagination, almost no strategic thinking or planning, and with an absence of well-developed sources of data to guide its decisions, it often misses opportunities to chart independent courses of action like the one identified by the Ford Foundation as to satellite policy. To be sure, the agency also has an uncomfortable track record of conducting its proceedings—like the finsyn rulemaking and a number of proceedings discussed below—without engaging in careful data-driven decision-making, thereby inviting reversal on appeal. To highlight this issue, Section B discusses three recent case studies in which the agency has operated in a highly questionable fashion.

B. The Political Culture of the FCC

The conduct of administrative regulation at the FCC over the last several years has underscored the institutional failings long cited by critics of the agency. In just the second half of 2007, three high profile and important proceedings—the open access rules imposed as part of the 700 Megahertz (MHz) auction, the proposed regulations on cable based on a finding of adoption of cable services by 70% of consumers, and the media ownership rules—illustrated the problematic nature of the how the FCC often operates. Taken together, the portrait of agency dysfunction raised by these proceedings illustrate the nature of the agency's institutional failings, highlight how it can ultimately undermine the success of policymaking initiatives, and make a compelling case for institutional reform.

In the summer of 2007, the FCC debated and developed rules for imposing an open access obligation on a wireless provider as part of the auction of valuable "beachfront" wireless spectrum in the 700 MHz band.[28] In stimulating this discussion, however, the FCC failed to suggest publicly that it had any particular proposal in mind, only stating in its Notice of Proposed Rulemaking (NPRM) the general possibility that it might take some action along these lines.[29] Subsequent to the issuance of the NPRM, as Cynthia Brumfield described the process, "Chairman Kevin Martin floated an unofficial proposal (via *USA Today* no less),[30] everybody scrambled, a circus ensued and a compromise, *a clearly political compromise*, was ultimately made."[31] Consequently, the debate over the proposal was hurried and conducted via vague and

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[26] Hundt, *supra* note 14, at 3.

[27] Drew Clark, *Industry Experts Disagree on Best Path to Improve FCC*, TECHNOLOGYDAILY, (Mar. 24, 2005), http://www.nationaljournal.com/pubs/techdaily/pmedition/2005/tp050324.htm.

[28] Service Rules for the 698-746, 747-762 and 777-792 MHZ Bands, *Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 8064 (2007).

[29] *Id.* at 51-52.

[30] Leslie Cauley, *New Rules Could Rock Wireless World*, USA TODAY, July 10, 2007, http://www.usatoday.com/money/industries/telecom/2007-07-09-wireless-telecom_n.htm.

[31] Cynthia Brumfield, *VZW Sues Over 700 MHz Rules. . . and May Win*, IP DEMOCRACY, Sept. 13, 2007, http://www.ipdemocracy.com/archives/2007/09/13/#002651 (emphasis in original); *see also* Cynthia Brumfield, *The FCC is the Worst Communicator in Washington*, IP DEMOCRACY, Sept. 5, 2007, http://www.ipdemocracy.com/archives/2007/09/05/#002640 ("Martin never made his proposal public and everybody was working off of press reports and rumors.").

hard-to-follow *ex parte* filings after the official notice-and-comment period had ended, resulting in a decision that left open a number of issues for later resolution.[32]

The rushed nature of the FCC's deliberation and decision-making process gave rise to a subsequent shadow debate over the scope of the rules after they were formally adopted. In the wake of the agency's decision, some parties apparently saw an opportunity for continued lobbying after the matter had purportedly been decided. Using its Policy Blog as a means of shedding sunlight on this development, Google Telecom Counsel Rick Whitt highlighted this very unorthodox tactic and noted with dismay that "it seems that a 'final' vote by a federal government agency is merely the beginning of a new phase in the process."[33] Ultimately, the FCC declined to change its rules in response to this effort.[34]

The second proceeding that merits examination is the effort by to impose a wide-ranging set of prescriptive regulations on cable companies based on highly questionable information. Under the 1992 Cable Act, the FCC is authorized to develop more restrictive regulations of cable television providers if they reach a level of serving 70% of the country and have 70% of subscribers in that territory.[35] The first figure was attained many years ago, but the FCC has never suggested that cable providers had reached the second one, generally suggesting that cable penetration reached around 55% of the population (with satellite TV and over-the-air TV serving the rest).[36] In compiling its regular report evaluating the multi-channel video programming distribution (MVPD) marketplace, the FCC regularly asked about the reach of cable television providers, but this report was widely viewed as a fact-gathering effort and not as a prelude to adopting regulations.

In the fall of 2007, Chairman Martin proposed that the FCC conclude that the so-called 70/70 threshold had been met. To justify this finding, he suggested that the agency rely on a single source (a provider that later repudiated its own figure) and sought to suppress other relevant information.[37] In so doing, the agency did not use an adjudicative process—or even the formal notice and comment process—to generate a factual basis for its actions or to discuss the issue. Moreover, in proposing to embark on a new course, Chairman Martin did not even alert his fellow Commissioners (let alone the public) of the specifics of the proposed rule changes or the questions related to the data that underlie them. In fact, as the House Commerce Committee majority report found, "[a]ll of the other data collected in response to the Notice of Inquiry was initially withheld from the other Commissioners, and the career staff was directed not to discuss it with them."[38] To some observers, this tactic merely reflected his operating style of keeping

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[32] Service Rules for the 698-746, 747-762 and 777-792 MHZ Bands, *Second Report & Order*, 22 FCC Rcd. 15,289 (2007).

[33] Richard Whitt, *Pro-consumer Spectrum Auction Rules at Rist at the FCC?*, GOOGLE PUBLIC POLICY BLOG, Oct. 3, 2007, http://googlepublicpolicy.blogspot.com/2007/10/pro-consumer-spectrum-auction-rules-at.html.

[34] According to one account, this decision was not for lack of trying by Martin. *See* Jeffrey Silva, Martin Working to Revise 700 MHz Open-Access Provisions, RCRWIRELESS, Sept. 26, 2007, http://rcrnews.com/apps/pbcs.dll/article?AID=/20070926/FREE/70926006/1005.

[35] 47 U.S.C. §532(g).

[36] Press Release, FCC, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report 1 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

[37] *See* Ted Hearn, *Watching the Martin Watch*, MULTICHANNEL NEWS, Jan. 21, 2008, http://www.multichannel.com/article/CA6524092.html.

[38] DECEPTION AND DISTRUST, supra note __, at 13.

"his plans tightly wrapped, believing there's a tactical advantage in springing them on other commissioners with little notice."[39]

In the case of the proposed regulations for cable providers, the agency ultimately refused to act in a secretive and hurried manner. Notably, in evaluating the relevant information, Commissioner Adelstein (who apparently was the swing vote) reported on the day he voted against the proposed order that:

> I did not learn until after 7:00 pm last night that the FCC's own 2006 survey found that only 54 percent of homes passed subscribe to cable. Similarly, the FCC's cable price survey came in at 55.2 percent penetration. Based on these newly unearthed facts and the conflicting evidence on the record, I am unable to support a finding that 70 percent of homes passed subscribe to cable at this time. The data is inconclusive. If we were truly searching for the truth, it is inconceivable that our own data would be cast aside without mention.[40]

Moreover, Commissioner Adelstein noted that the process used in that case—a failure to give sufficient notice to the other Commissioners—did not reflect any imperative for immediate action, but was merely a tactical effort to limit the opportunity for discussion and deliberation.[41]

A third proceeding that merits notice is the Commission's 2007 evaluation of the media ownership rules. In that case, Chairman Martin detailed his proposal in a press release and a *New York Times* op-ed (rather than in a Further Notice) only a little over a month before he

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[39] Jim Puzzanghera, *Criticism of the FCC's Chairman is Widely Aired*, L.A. TIMES, Dec. 10, 2007, at C1, *available at* http://articles.latimes.com/2007/dec/10/business/fi-fcc10.

[40] Statement of FCC Comm'r Jonathan S. Adelstein, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming 1 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A4.pdf.

[41] As Commissioner Adelstein put it:

> One of the reasons for the embarrassing delay of today's meeting, and the general disarray in working through these issues, was the effort to push through such an aggressive number of controversial items today without sufficient notice to all Commissioners. Short-circuiting Commission procedures short-changes the American public in the end. This is particularly true given that nothing we are considering today requires immediate action. There are numerous items that would have benefited greatly from more deliberation and care.

Id. at 3. In that same proceeding, Commissioner Robert McDowell also questioned Chairman Martin's management of the deliberative process, explaining that:

> Interestingly, this year, in a disturbing development, the FCC's most recent Form 325 data was not made available to commissioners for review until 7:09 p.m. last night. It was only made available once it was obvious that a majority of the Commission would not support the initial draft of this Report because it was such a dramatic departure based on mysterious statistical manipulation. But why was this data omitted or suppressed to begin with? Was it because it concluded cable penetration was only at 54 percent, just like last year?

Statement of FCC Comm'r Robert M. McDowell, Dissenting in Part, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming 2 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A6.pdf.

asked his fellow Commissioners to vote on the proposal.[42] Notably, this release was not only the first time the public heard of the particular proposal, but it was "also the first time the Commissioners were notified of the details."[43] In defense of this tactic, Chairman Martin stated that the FCC was neither required to, nor in the habit of, releasing the text of the proposed rules before voting on them.[44]

In the media ownership proceeding, the Commission announced its decision in a twelve-page press release a week before Christmas 2007.[45] At that time, Commissioners Copps and Adelstein both protested the substance and the process used to develop the rules. In particular, Commissioner Copps recounted that the FCC engaged in the last minute charade of pretending to allow input via a public hearing in Seattle (at which 1,100 citizens came with a week's notice) and a last minute notice (after the outcry about the *New York Times* op-ed) while at the same time rushing to complete and vote on an Order without taking the public's concerns seriously. In a telltale sign of the rushed nature of the proceeding, the process of revising the Order continued right up until the Commission was set to vote on it. As Copps recounted:

> Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period [when comments, even on an "*ex parte*" basis, can no longer be filed] had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the [the relevant rules]. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words "[Revised discussion to come]." Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman's latest thinking.[46]

Finally, in a practice that is all too common at the FCC, the agency did not release its final rules until almost three months after the vote,[47] leaving affected parties to guess what the Order

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[42] Kevin J. Martin, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, *available at* http://www.nytimes.com/2007/11/13/opinion/13martin.html?_r=1&oref=slogin.

[43] Testimony of Jonathan S. Adelstein, Federal Communications Commission Oversight Hearing 2 (Dec. 13, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278905A1.pdf. Ironically, the regulations being considered were to replace a set of regulations that the Third Circuit invalidated for, among other reasons, that they were adopted without sufficient public notice to allow careful deliberation and examination of their weaknesses. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 409-13 (3rd Cir. 2004).

[44] *See* Testimony of Kevin Martin, Federal Communications Commission Oversight Hearing 4, (Dec. 13, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278904A1.pdf.

[45] Press Statement of Kevin J. Martin, Chairman of the FCC, Media Ownership (Dec. 18, 2007), *available at* http://www.fcc.gov/kjm121807-ownership.pdf.

[46] Statement of FCC Comm'r Michael J. Copps, Concur in Part, Dissent in Part, Promoting Diversification of Ownership in the Broadcasting Services 2 (Dec. 18, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A3.pdf [hereinafter *Copps Statement*].

[47] Promoting Diversification of Ownership in the Broadcasting Services, *Report & Order & Third Further Notice of Proposed Rule Making*, 23 FCC Rcd. 5922 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.pdf. For the newspaper/broadcast cross-ownership rule, the FCC released the text of the order around six weeks after the initial vote. *See* 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Order*

discussed, allowing a shadow lobbying process to attempt to influence the issue after the decision, and raising questions about the legitimacy of the decision that was ultimately adopted. In this context, moreover, the delay only underscored that the earlier rushed push for a vote did not reflect any bona fide urgency, but rather was a tactical effort by the Chairman to close a proceeding on his preferred terms.[48]

In all three cases described above, the Commission treated the public as irrelevant to its institutional operation. In each case, interested parties (and even some Commissioners) were reduced to reading press reports (based on leaks) to gain insight into the issues before the agency. Commissioner Adelstein decried the agency's approach to regulatory policy in the cable context, stating that "[w]e cannot cook the books to pursue a political agenda without dismantling our very institution. We simply must act like the expert agency Congress intended, and not squander our precious legacy."[49] Finally, agency staff persons have criticized the politicized manner in which the agency has operated of late, complaining, on one account, that they were "sick of what they experience as a super-politicized work life in which just about anything that they want to do has to get the go-ahead from the top[.]"[50]

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on Reconsideration, 23 FCC Rcd. 2010, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.doc.

[48] In particular, Commissioners Copps and Adelstein noted upon the release of the newspaper/broadcast cross ownership rule that:

> After being told we have to "hurry up" and vote by December 18, the Commission waited over a month and a half before finally issuing this Order. Apparently, it took the majority that long to finalize issues left unresolved at the time we voted. There is no reason we could not have heeded the wishes of many in Congress to take the time needed to work these kinks out before the Commission voted.

Press Release, FCC, Joint Statement By FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Order 1 (Feb. 4, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280001A1.doc.

[49] Cynthia Brumfield, *FCC Late-Night Vote Underscores Disarray at the Agency*, IP DEMOCRACY, Nov. 28, 2007, http://www.ipdemocracy.com/archives/2007/11/28/#002781. Commissioner Copps offered similar assessments as to how the media ownership proceeding was conducted, explaining in his dissenting opinion that:

> This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters.

Copps Statement, *supra* note 46, at 2.

[50] Matthew Lasar, *FCC Insider: This Place is Hell; Silent Protest Planned*, ARS TECHNICA, Mar. 16, 2008, http://arstechnica.com/news.ars/post/20080316-fcc-insider-this-place-is-hell-silent-protest-planned.html. In that report, an FCC staff person related that:

> In the past I may or may not have agreed with the outcome, but at least the proper procedures were followed. Now they tell us "what are the media reform groups going to do: file a class action lawsuit? Just do it." But ethically I have to sleep at night. It's not the decision, it's *how* the decision is reached. The situation has become arbitrary and capricious.

C. The Possibility of Regulatory Reform

Shakespeare famously wrote that "what's past is prologue[.]"[51] At the FCC, that might well be the case. Nonetheless, policymakers need not view it as inevitable that the agency will continue to use broken procedures. As scholars have emphasized, institutional strategies matter and "organizations can be structured to optimize the benefits and costs of expert decision-making."[52] Famously, after President Kennedy blundered in the management of the Bay of Pigs episode, which reflected poor planning and a lack of discussion of alternatives, he instituted a far more effective institutional process to manage the Cuban Missile Crisis.[53]

For an example of how a regulatory agency can change in terms of its operating procedures, consider the case of the Civil Aeronautics Board (CAB). Historically, that agency's operating procedures failed to spur deliberation and data-driven decision-making. Thus, after being appointed Chair of the agency, "[Alfred] Kahn criticized what he viewed as an intellectually bankrupt means of doing business—deciding issues in secret, without deliberation, and asking lawyers to develop the necessary justification for a pre-determined result."[54] Reflecting his commitment to transparency and open debate, he systematically changed how the agency operated, starting with a commitment to write orders in understandable prose. Ultimately, however, Kahn's changes at the CAB were short-lived because the agency was dismantled in the 1980s pursuant to the Airline Deregulation Act.

At the Federal Trade Commission, strong leadership and a commitment to sound institutional practices overcame the legacy of an "erratic career" that left the agency vulnerable to mission creep and sailing adrift.[55] In particular, over the last 25 years, the agency has "come back from the brink" and currently operates in an effective manner that has won accolades for its ability to be an effective political entrepreneur and regulator in the Internet age.[56] Two successful recent FTC Chairs, Robert Pitofsky and Tim Muris, both were successful political entrepreneurs who effectively utilized strategic planning and a positive agenda to lead the agency, focusing on important opportunities, such as confronting the Internet as an important social and economic

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Id (emphasis in original).

[51] WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

[52] Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 561 (2002).

[53] *Id.*

[54] Philip J. Weiser, *Alfred Kahn As A Case Study of A Political Entrepreneur: An Essay in Honor of His 90th Birthday*, 7 REV. OF NETWORK ECON. 603 (2008), *available at* http://www.rnejournal.com/artman2/publish/Vol7_4/Alfred_Kahn_as_a_Case_Study_printer.shtml. As Kahn described the CAB's process for generating opinions before his arrival:

> [A] lawyer on the General Counsel's staff, amply supplied with blank legal tablets and a generous selection of clichés—some, like "beyond-area benefits," "route strengthening" or "subsidy need reduction," tried and true, others the desperate product of a feverish imagination—would construct a work of fiction that would then be published as the Board's opinion.

THOMAS K. MCCRAW, PROPHETS OF REGULATION 286 (1984).

[55] MCCRAW, *supra* note 54, at 126-27.

[56] As FTC Chairman Bill Kovacic described, the FTC was loathed by Congress in the early 1980s, with one Congressman concluding that it was "'a rogue agency gone insane.'" William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 590 (1982) (quoting Representative William Frenzel). By the time Kovacic wrote his article on the topic, he concluded that the agency was already mending its ways and becoming more effective. *Id.* at 671 (noting its effective use of, among other things, "planning, research, and preliminary screening"). For a more recent positive appraisal of the agency, see Steven Hetcher, *The FTC As Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000).

force as well as spearheading the enactment of the Do Not Call list regulations. In so doing, they ensured, as Tim Muris put it, that the agency was not merely a "passive observer, swept along by external developments and temporary exigencies."[57] The agency's ability to implement such an agenda and re-establish its value to the nation underscored the wisdom of giving it a second chance to right itself in the midst of calls for it to be shut down on account of its flawed institutional processes and lack of clear-eyed and common sense priorities.[58]

For a final example of how an agency can change, consider the case of Ofcom, the UK regulator of the communications industry. Prior to the establishment of Ofcom, observers complained that the operation of one of its predecessor agencies, the Independent Television Commission (ITC), paralleled in some ways how the FCC operates today. As one regulated entity noted:

> [I]n terms of getting a fair hearing and in terms of being confident that the regulator has absolutely assessed the merits of the various competing cases, we think Ofcom plays a pretty straight bat, and that was not always the case in the past. At the ITC, there was a tendency for a decision to come out of nowhere and you would not have any forewarning, you would not even know it was an issue for consultation and suddenly it was not just a consultation, it was a decision.[59]

By contrast to its legacy means of operation, Ofcom has established itself, in a relatively short period of time (it was founded in 2003), as an "evidence-led" regulator that is committed to the proposition that gathering evidence and making data-driven decisions is "part and parcel of effective regulation[.]"[60]

II. Toward A New Institutional Strategy

A critical failing of the FCC is that, with limited exceptions, it rarely acts strategically. The agency's tendency towards making reactive judgments operates both on the macro-level—in terms of what issues the FCC prioritizes—as well as on the micro-level—how the FCC conducts and manages its particular proceedings. With respect to the macro-level, the FCC generally does not set forth and commit to a clear agenda of what issues it will prioritize; indeed, when it does address specific issues, it generally seeks to preserve its discretion (to act in an *ad hoc* manner) by avoiding standards that constrain its policy choices.[61] On the micro-level, the FCC tends to use NPRMs that set forth broad and vague lines of inquiries, giving parties very little guidance on what issues to address while preserving its discretion to proceed in any number of directions. This practice gives a decided advantage to "inside players," who

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[57] Timothy J. Muris, *Principles for a Successful Competition Agency,* 72 U. CHI. L. REV. 165, 168 (2005).

[58] Former FTC Commissioner Phil Ellman, for example, concluded in the early 1970s that the "best thing to do would be to start all over again, abolish the commission and set up a new agency." NORMAN I. SILBER, WITH ALL DELIBERATE SPEED (2004).

[59] Statement of Mr. Christy Swords, Director of Regulatory Affairs, ITV, at the House of Lords Select Committee 11 (Apr. 24, 2007), *available at* www.parliament.uk/documents/upload/correctedEV920070424.pdf.

[60] *Id.* at 3.

[61] The Landis Report highlights this phenomenon, reporting that "criteria of various different kinds are articulated but they are patently not the grounds motivating decision. No firm decisional policy has evolved from these case-by-case dispositions. Instead the anonymous opinion writers for the Commission pick from a collection of standards those that will support whatever decision the Commission chooses to make." LANDIS, *supra* note 20, at __.

are sophisticated in reading tea leaves, skilled at keeping up with leaks of information, and able to follow the *ex parte* process, which has long been abused at the FCC.[62]

Going forward, the FCC has the opportunity to set a strategic agenda and commit to procedures that ensure a high level of transparency. On the strategic level, the FCC needs to establish a pre-set agenda and begin to undertake overarching evaluations of broad policy such as maximizing the use of spectrum, the impact of market structure (on prices, innovation, and, in the media sector, the availability of local and diverse content), and the use of advanced technology by public safety agencies.[63] All too often, the FCC approaches these topics in an isolated fashion—say, in the context of a merger review or a proceeding involving a band of spectrum—and is forced to invent its entire approach to an issue on the fly.[64] In so doing, the agency improvises on a series of dimensions at once—whether to use a rulemaking or an adjudication to set or refine rules, how to emphasize back-end enforcement versus front-end restrictions, and whether to impose disclosure requirements.

The upshot of the FCC's method of decision-making is that it often makes important judgments with limited data, an artificially constrained set of alternatives, and, in many cases, a penchant for delay.[65] As is evidenced in a number of cases (including the ones discussed Part I), this approach produces suboptimal results and leaves both Commission staff and affected parties without a clear sense of the agency's goals or direction.[66] But the impact of the FCC's process is more subtle and insidious than that. Notably, because the agency's flawed processes undermine the ability of investors and entrepreneurs to predict how and when the agency will act, the FCC's institutional processes discourage new firms from developing technologies that will depend on FCC decisions (say, as to spectrum regulation). Thus, whereas the poor results that flow from the FCC's flawed processes are sometimes apparent and may be corrected at some point down the road (say, on judicial review), the lack of investment and innovation that ensues from an absence of predictable, expeditious, and reasoned decision-making invariably remains unaddressed and constitutes a loss to the economy and society as a whole.

A. Strategic Agenda Setting

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[62] Indeed, in the Landis Report's assessment of administrative agencies, it concluded that the FCC "more than any other agency, has been susceptible to *ex parte* presentations." LANDIS, *supra* note 20, at __.

[63] Former Chairman Hundt and Greg Rosston suggested a similar approach, albeit one that would also involve the Department of Justice. Hundt & Rosston, *supra* note 7, at 34.

[64] Former FCC Chair Newt Minow claims that this failure is endemic to the multi-member commission structure, which drives the practice of "postpon[ing] the policy decision to resolution on a case-by-case basis which all too often means inconsistent decisions with the public and the regulated industry not knowing the ground rules." Minow, *supra* note 1, at 147. This claim is questionable, however, insofar as other regulatory agencies, such as the SEC and the FTC, do not face this systemic problem despite the need to operate as a collegial body.

[65] As noted above, the FCC traditionally relies on the commercial parties for submissions of the relevant data, leaving it hostage to their imagination (or lack thereof) and self-interested objectives. See n. __ and accompanying text. The Landis Report emphasized this failing, noting that "[l]eadership in the effort to solve problems seems too frequently to be left to commercial interests rather than taken by the Commission itself." Similarly, it concluded that "On major policy matters, the Commission seems incapable of reaching conclusions." LANDIS, *supra* note 20, at __.

[66] Former FCC Commissioner Johnson bemoaned this state of affairs by highlighting that, if the Commission pre-committed to clear goals, methodologies, and constrained its discretion through a commitment to transparent institutional processes, "[t]he FCC staff and the parties that appear before the Commission would have more specific knowledge of what is required of them in the regulatory scheme, and the regulated industries would operate more efficiently by knowing more about what the Commission's regulatory policies were designed to accomplish." Johnson, *Administrative Decisionmaking,* supra, at 179.

To appreciate the overall lack of strategic agenda setting at the FCC, consider the model of regulation used by the European Commission (EC). The EC uses a tripartite process to gather information and engage the public when it formulates its regulatory strategy. First, it encourages its staff members to develop their views and perspectives in working papers, which they release to the public. Second, the agency commissions independent research to inform the agency's own thinking. Finally, it engages the public, opening up what it calls a "consultation," to seek diverse views and perspectives on the relevant issues. Based on this process, the EC is in a position to develop its overarching regulatory strategy for a broad policy area, such as the transition to the next generation of Internet technology and the role for public policy therein.[67] In that context, for example, the EC has set out its specific goals and outlined a timetable for consideration of a number of the relevant issues.[68]

The EU is hardly alone in using a model of regulatory policymaking that involves considerable up-front analysis and discussion before setting an overarching course. Ofcom, the regulator established in the UK in 2003, has internalized a commitment to strategic policymaking. To that end, it embarks on a series of broad reviews, uses regular consultancies, and issues "Annual Plans" to explain its views on the general regulatory environment and what issues will be addressed going forward.[69] Moreover, in a case closer to home, consider how the Federal Trade Commission (FTC) is engaging in a systematic effort to increase its knowledge base on emerging issues such as behavioral advertising.[70] In that context, the agency first identified the issue as part of its set of hearings on "Protecting Consumers in the Next Tech-Ade," where it invited a large number of stakeholders to offer their perspectives. Resulting from that investigation, the FTC hosted a Town Hall on "Behavioral Advertising: Tracking, Targeting, and Technology." Finally, after an effort by FTC staff to identify a set of principles and issues for resolution, the agency released a document entitled "Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles," inviting further comments from stakeholders.[71] By contrast, the FCC generally collapses all three of these steps into a single process that all too often begins with a broad and vague notice and ends with a blizzard of *ex parte* filings and rules adopted in haste, without sufficient deliberation, public input, or transparency.

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[67] For the EC's press release, see Press Release, Europa, Commission Consults on How to Put Europe Into the Lead of the Transition to Web 3.0 (Sept. 29, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1422&format=HTML&aged=0&language=EN&guiLanguage=nl. For the background working paper, see COMMISSION OF THE EUROPEAN COMMUNITIES, *Accompanying Document to the* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS (2008) (Workikng document, available at http://ec.europa.eu/information_society/policy/rfid/documents/earlychallengesIOT.pdf).

[68] COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 10-11 (Sept. 29, 2008), *available at* http://ec.europa.eu/information_society/eeurope/i2010/docs/future_internet/act_future_networks_internet_en.pdf.

[69] *See, e.g.*, OFCOM, A CASE STUDY ON PUBLIC SECTOR MERGERS AND REGULATORY STRUCTURES (2006), http://www.ofcom.org.uk/about/accoun/case_study/case_study.pdf.

[70] As former Chairman Muris explains, this approach follows similar efforts by Pitofsky and himself to engage in relevant policy research and development. *See* Muris, supra note __, at 176-179.

[71] FTC, ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES (2007).

It merits note that the model of strategic agenda setting urged here is not completely foreign to the FCC. Such an approach, however, has yet to take hold as part of the agency's culture. Consider, for example, the extremely thoughtful framework developed by Chairman Kennard in his vision of "A New Federal Communications Commission for the 21st Century."[72] In his vision document, Chairman Kennard highlighted the importance of identifying high level strategic priorities and specific measures that the agency proceeds to implement them. Notably, he focused on the value of moving away from classic technology-based distinctions, urging the Commission to focus instead on [1] universal service, consumer protection, and information; [2] enforcement and promotion of pro-competitive goals domestically and internationally; and [3] spectrum management.[73] In so doing, he presciently identified that the traditional divide between local and long distance communications would disappear and broadband communications would eclipse narrowband. Unfortunately, while Kennard's vision document identified very important, forward looking questions—such as "whether and how the government should be involved, if at all, in applying [the historic commitment to open architecture and interconnection] in [an environment] where competition will largely replace regulation[,]"[74] it failed to provide any framework to generate answers for them or timeline for the relevant questions to be addressed.

When Chairman Powell replaced Chairman Kennard, he declined to embrace and follow through on the vision set forth in the "A New Federal Communications Commission for the 21st Century." In particular, he did not seek to fundamentally restructure the operations of the agency along functional lines,[75] as Kennard had begun to do by consolidating the agency's enforcement and public information functions and had envisioned in his framework.[76] Although Powell did not take any transformational steps to align the agency's operations on functional lines, he did take the important step of recognizing the impact of technological convergence by merging the separate Mass Media and Cable Bureaus. Moreover, he appreciated, in principle at least, the importance of setting broad areas of focus and identified six of them—(1) broadband; (2) competition; (3) spectrum; (4) media; (5) public safety and homeland security; and (6) the modernization of the FCC. He did not, however, offer any "meta" strategy for how to conceive of and pursue them.

In the important area of spectrum reform, Chairman Powell developed a strategic and broad agenda through a process not unlike that used by the EC. In particular, he commissioned the creation of an interdisciplinary task force that drew upon a number of talented public servants to think through and broadly reconceive of the goals of spectrum policy. The Spectrum Policy Task Force report that emerged from that process gave rise to a number of important issues to evaluate and marked a rare instance where the FCC sought to set a pro-active agenda.[77] Moreover, the Task Force's work and its effort to identify relevant proceedings in a comprehensive and coherent manner markedly distinguished the treatment of that area from other priorities of the agency.[78] To underscore the point, consider that the only other one of the

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[72] WILLIAM E. KENNARD, A NEW FEDERAL COMMUNICATIONS COMMISSION FOR THE 21ST CENTURY (1999), *available at* http://www.fcc.gov/Reports/fcc21.html.

[73] *Id.* at 1.

[74] *Id.* at 4.

[75] *Id.* at 15.

[76] *Id.* at 10-12.

[77] FCC, SPECTRUM POLICY TASKFORCE REPORT (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.

[78] Compare, for example, the information related to the relevant goals of the agency with respect to spectrum and other issues. *Compare* FCC, Strategic Goals for Proceedings and Initiatives, http://wireless.fcc.gov/spectrum/proceeding.htm (last visited Dec. 17, 2008) *with* FCC, Strategic Goals for

six priorities noted above where the agency displayed a hint of broad strategic thinking was public safety and homeland security, where it adopted (in 2003) a two-page action plan to govern its efforts in the area.[79]

Under Chairman Martin, the broad goals identified by Chairman Powell were kept in place, but the broad project of spectrum reform as identified by the Task Force report was essentially abandoned without any effort to set alternative strategic priorities.[80] In so doing, the agency left spectrum policy issues to once again be addressed on an *ad hoc* basis—i.e., without the benefit of any overarching commitment to resolve particular issues, a more developed empirical and theoretical framework for regulatory policy, or any commitment to communicating to the public the agency's perspective on those issues. Reflecting the frustration that telecommunications issues are not guided by any overarching agenda and thus appear on (and disappear from) the agency's agenda without apparent reason or warning, some commentators have complained that the FCC is "the worst communicator in Washington."[81]

B. A Commitment to Transparency

The FCC's lack of transparency operates on a number of levels. First, when the agency announces a rulemaking, it rarely suggests specific rules and sometimes does not even ask specific questions for parties to address. Second, the FCC's notice-and-comment processes are often a meaningless precursor to the "real" discussion that occurs during the so-called *ex parte* process, where parties file short statements that, at least often in practice, do not set out the full extent of oral discussions. This unofficial opportunity for comment, which is not regulated by any legal framework and generally is available only to those well connected to the agency, was judged by FCC Chairman Powell in 2005 as "out of control."[82] Finally, when the FCC announces its adoption of an order, it often does so without releasing the actual text, raising questions as to what the agency actually voted on and what happens between the so-called vote and the final issuance of the order—which can take place many months later. I will discuss how and why the FCC needs to reform each of these shortcomings.

In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the

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Competition, http://www.fcc.gov/competition (last visited Dec. 17, 2008), *and* FCC, Strategic Goals for Broadband, http://www.fcc.gov/broadband/ (last visited Dec. 17, 2008), *and* FCC, Strategic Goals for Media, http://www.fcc.gov/mediagoals/ (last visited Dec. 17, 2008).

[79] FCC, HOMELAND SECURITY ACTION PLAN (2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236428A2.pdf

[80] *See* Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, *Order*, 22 FCC Rcd. 8938 (2007) [hereinafter *Interference Temperature Metric*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-78A1.pdf. CITE to Copps statement.

[81] Cynthia Brumfield, *The FCC is the Worst Communicator in Washington*, IP DEMOCRACY, Sept. 5, 2007, http://www.ipdemocracy.com/archives/002640the_fcc_is_the_worst_communicator_in_washington.php; *see also* John Dunbar, *FCC Shrouds Rulemaking in Secrecy*, THE NEWS & OBSERVER, Sept. 5, 2007, http://www.newsobserver.com/print/wednesday/front/story/692625.html ("It's odd for an agency that has the word 'communications' as its middle name, but the Federal Communications Commission routinely leaves the public in the dark about how it makes critical policy decisions."); Ted Hearn, *Federal Incommunicado Commission*, MULTICHANNEL NEWS, Aug. 8, 2007, http://www.multichannel.com/blog/1830000183/post/450012845.html.

[82] Michael K. Powell, Remarks at the Digital Broadband Migration Conference: Rewriting the Telecom Act (February 14, 2005), http://caetevida.colorado.edu/TEGRITY/SiliconFlatirons/SilFlatsFeb05L06.wmv.

challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include "a description of the subjects or issues involved."[83] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation.

To appreciate the real world impact of the FCC's practice, consider the case of a recent initiative to impose requirements on local radio stations to compile playlists and community outreach efforts.[84] The basic idea behind the proceeding—to develop more information related to how radio stations operate—was a noble one (see Part III, below), but the way it was conducted deprived the public and affected parties of key information that could have informed their participation and feedback. In that case, radio lobbyists were left scrambling to find out relevant details about the specific proposal, such as who would have to submit such reports and how often.[85] Unfortunately, the situation was hardly unique, with "[c]ommunications lawyers and lobbyists privately complain[ing] they have difficulty figuring out the status of their issues at the FCC."[86] This state of affairs raises the obvious question that, in an environment where even some well-connected lobbyists cannot discern such information, how can ordinary consumers hope to offer meaningful input?

To remedy the FCC's use of vague and generalized NPRMs, the agency should commit to publishing model rules or at least specific suggestions on any topic it envisions addressing to set the stage for public comment. If the agency engages in the strategic planning effort suggested above, disclosing more relevant details at the outset of proceedings should flow naturally. Notably, releasing the proposed rules up front is the common practice for many other agencies;[87] for the FCC, however, it constitutes the exception. This places the FCC far outside the norm of most agencies, which release notices that "routinely contain the full text of the rule as well as lengthy preambles, including the information, data, and analyses upon which the agency relied."[88]

If the FCC persists in opening proceedings with only a general description of the relevant issues, it has two options for providing sufficient notice and enabling effective deliberation. First, it could begin with a Notice of Inquiry, which is designed to elevate the agency's understanding of an issue and not to generate binding rules. Alternatively, if it does use an NPRM with limited disclosure of the issues that ultimately emerge as important, it should issue a Further Notice of Proposed Rulemaking, as the agency recently did in the so-

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[83] 5 U.S.C.§ 553(b)(3). The D.C. Circuit has specified that the relevant concern is that "[i]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).

[84] Broadcast Localism, *Report on Broadcast Localism & Notice of Proposed Rulemaking*, 23 FCC Rcd. 1324 (2008).

[85] Amy Schatz, *Industry Seethes as FCC's Martin Sets New Curbs*, THE WALL STREET JOURNAL, Dec. 18, 2007, at A1.

[86] Puzzanghera, *supra* note __

[87] At NTIA, for example, Notices of Proposed Rulemakings often are both shorter in terms of the relevant background and focus commenters specifically on suggested rules. *See, e.g.*, E-911 Grant Program, 73 Fed. Reg. 57,567 (Oct. 3, 2008) (to be codified at 47 C.F.R. pt. 400).

[88] Jennifer Nou, Note, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL'Y REV. 601, 610 (2008).

called D Block proceeding (which was designed to facilitate the emergence of a private-public partnership for public safety communications).[89]

As for the *ex parte* process, the agency's commitment to greater transparency as to what issues are up for discussion at the commencement of a rulemaking will limit the need and opportunity for a heavy reliance on *ex parte* communications. In any event, the agency needs to take seriously the commitment to a reasonable level of disclosure when *ex parte* meetings take place. Indeed, in some cases, the general disclosures in the filings that accompany such meetings verge on the comedic. Take, for example, a filing by Alltel that stated merely that company officials met with a few FCC staff persons "to share our thoughts" on a particular proceeding.[90] This sort of filing has repercussions for the parties themselves insofar as their desire to keep their presentations secret is at odds with the legal requirement to make "a record" of their objection in order to pursue them on appeal. Thus, a system of *ex parte* filings devoid of content not only is detrimental to informed deliberation of the relevant issues, but also undermines the opportunity for meaningful judicial review.[91] To be sure, the penalty placed on parties deprived of judicial review provides some incentive not to engage in the prevailing practice, but the culture of secrecy retains a powerful hold on those engaged in the *ex parte* process. Consequently, the appropriate remedy is a fundamental reform of how the agency operates, including not merely ending the use of vague NPRMs, but also requiring agency officials (as opposed to lobbyists) to be responsible for filing the document that captures the relevant discussions (as many other agencies require).[92]

The abuse of the *ex parte* process is exacerbated by two features of FCC proceedings that are under the Commission's control—(1) the length of the proceedings; and (2) the lack of a well-developed and evidence-based record. First, if the FCC could manage its proceedings with an eye to how issues are developed and commit, as a general strategy, to open a Further NPRM after a certain interval, it would elevate the importance of "official" filings—as opposed to placing the real weight on *ex parte* filings. One option, suggested by a few commentators, is to institute a "shot clock" that would require agency action within a prescribed period of time.[93] Rather than impose a procedure that would artificially rush resolution of difficult issues, however, the agency should institute the norm that it will conduct proceedings in a timely manner and embarrass itself when it does not—prominently listing on its website the pending proceedings, how long they have remained unresolved, and the status of the record.[94] Second, if

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[89] Service Rules for teh 698-746, 747-762 and 777-792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, WT Dkt. No. 06-150, 2008 WL 4382752 (Sept. 25, 2008).

[90] Letter From Laura Carter, Vice President for Federal Government Affairs, Alltel Corporation, to Marlene Dortch, Secretary, FCC (Apr. 30, 2008), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520006854

[91] In a costly example of this phenomenon at work, Sprint was prevented from challenging certain FCC rules that might require it to vacate valuable spectrum because the company had failed to make its arguments in *ex parte* filings with sufficient specificity to be preserved for appellate review. *See* Sprint Nextel Corp. v. FCC, 524 F.3d 253, 256-58 (D.C. Cir. 2008).

[92] Another obvious option—for the agency to police abuses in the *ex parte* process itself—is one that the FCC has shown itself unwilling to or incapable of pursuing. *See* Mike Marcus, Marcus Spectrum Solutions Files Petition on Asking FCC to Pay More Attention to *ex parte* Violations, Spectrum Talk Blog (September 11, 2008), http://spectrumtalk.blogspot.com/2008/09/marcus-spectrum-solutions-files.html.

[93] For a skeptical assessment of such suggestions, see Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987).

[94] To appreciate the need and cause for such embarrassment, consider that it is not unheard of for the FCC to leave proceedings languishing for longer than a decade. *See* Ted Hearn, *The Winds of Change*, MULTICHANNEL NEWS, Jan. 28, 2008, http://www.multichannel.com/article/CA6525874.html (noting

the FCC would, as discussed below, use Administrative Law Judges (ALJs) to conduct proceedings and develop an evidentiary record through open testimony under oath, it could radically change the agency's culture. In particular, once an ALJ published proposed findings of fact for evaluation by the Commission, the discussion would center on a relevant set of issues grounded in empirical data, ending the guesswork that drives much of the *ex parte* process for those who are not well-connected lobbyists.[95] Third, as discussed below, the FCC could commission and publish independent research to inform its deliberations and highlight the relevant issues for discussion.

Finally, as to the FCC's procedure for adopting rules, the agency needs to commit to issuing its written opinions on the day the decision is announced. At present, many high profile matters are decided when the actual written opinion has yet to be finalized. As for what the agency does during this time, one commentator suggested that the opinions do not reflect "well-reasoned statements of principle," but rather are a "patchwork of pieces" that must be stitched together after the decision is announced, often requiring substantive redrafting.[96]

III. Towards Principled and Collegial Decisionmaking

One critical challenge facing the FCC is how to evaluate more carefully how and when to use notice-and-comment rulemaking, adjudication, and merger review proceedings as strategies for making policy decisions. In all three contexts, the agency often takes procedural shortcuts that avoid engaging in true data development and evaluation. Consequently, the agency's "quasi" status—as a quasi-executive, quasi-legislative, and quasi-judicial body—becomes an impediment, rather than an asset, in addressing economic and social problems. As former FCC Chair Newton Minow put it, the FCC's ineffective use of this authority leaves it in "a never-never land" that produces only "quasi-solutions."[97] To highlight the failings in each context and the need for a more well-thought out strategy of how they should be used, I discuss one example of each and present a number of different possible reforms.

A. Notice and Comment Rulemaking

The theory of notice-and-comment rulemaking is that an agency can use this process to develop its policy judgments. The weakness of this format is that it does not provide the agency with an effective avenue for developing an empirical basis for and understanding of the issues involved in a regulatory policy domain. As Judge Posner explained in observing the agency's handling of the finsyn rules, "[t]he nature of the record compiled in a notice-and-comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence—further enlarges the Commission's discretion and further diminishes the capacity of the reviewing court to question the Commission's judgment."[98] Indeed, the appeal of using a procedure that can lead to "a cooking

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pendency of petition to deny must carry rights to TV stations that primarily air home shopping programming).

[95] In a stinging report that criticized the FCC's management of its *ex parte* process, the GAO determined that the FCC effectively enabled well-connected lobbyists to gain crucial information and insights about its processes that were not available to the public. GAO, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION, (2007), *available at* http://www.gao.gov/new.items/d071046.pdf. In a partial response, the FCC committed to post on its website all items that are circulating for a decision.

[96] Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 648 (1998).

[97] Minow, *supra* note 1, at 146.

[98] Schurz Commc'ns v. FCC, 982 F.2d 1043, 1048 (7th Cir. 1992).

the books," as Commissioner Adelstein noted as to an earlier rulemaking,[99] leads the FCC to rely almost exclusively on the paper record of the notice-and-comment rulemaking process and the use of the opaque *ex parte* process as a means of focusing in on its conclusions.

To appreciate the value of a process focused on data-driven analysis, consider the FCC's recent development of a location mandate for E-911 calls made from wireless phones. At a high level of generality, there was a consensus that facilitating better access to this information for public safety answering points (PSAPs) was an important public policy goal. In conducting the proceeding, however, the FCC used some of the same tactics noted above, seeking to impose greater specificity as to the location accuracy that wireless providers must share with PSAPs after a rushed process and on the basis of an *ex parte* proposal that was subject to no public comment and no agency deliberation.[100]

In dissenting from the E911 location Order, Commissioner Adelstein noted that "while I support providing first responders with the best data possible, today's item is fraught with highly dubious legal and policy maneuvering that bypasses a still developing record on what should be the reasonable and appropriate implementation details."[101] In particular, Commissioner Adelstein added that:

> Given the huge commitment of resources and effort needed to make the vast progress we have yet to make, a collaborative, cooperative approach is the most effective way to achieve the goals all of us share. Adopting in whole cloth an eleventh hour proposal at the stroke of Sunshine's end is not the way to promote an atmosphere for progress. Instead of working with all stakeholders, the Commission today simply adopts on a Tuesday a proposal filed on Friday. Offering no opportunity for deliberation or participation by so many stakeholders does not befit an expert agency.[102]

In highlighting the FCC's questionable conduct, Adelstein noted that the agency should not have rushed to a decision on a paper record, but rather should have taken advantage of workshops and collaborative forums to reach a solution that all parties, at least in principle, were committed to reaching.[103] Ultimately, the Public Safety and Homeland Security Bureau acknowledged that the Order was overly aggressive and imposed a stay,[104] prompting Commissioner Adelstein to highlight that the earlier decision to plow "forward with [mandating] compliance benchmarks without a full record, rather than conducting this proceeding in a more thoughtful and deliberate manner, [did] not truly advance E911."[105]

Rulemaking proceedings conducted on a paper record can serve a useful function. They are not, however, the right tool for all regulatory policy challenges. Moreover, they need to be used in a more strategic context—relying on developed knowledge and allowing for informed

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[99] Commissioner McDowell apparently seconded that judgment, in a private email to his staff. *See* DECEPTION AND DISTRUST, supra note __, at 14 (quoting McDowell as stating "[t]he books have been cooked to trigger the 70/70 rule.").

[100] Wireless E911 Location Accuracy Requirements, *Report & Order*, 22 FCC Rcd. 20,105 (2007).

[101] *Id.* at 20,136 (statement of Commissioner Jonathan S. Adelstein approving in part, dissenting in part).

[102] *Id.* at 20,137.

[103] *See* Wireless E911 Location Accuracy Requirements, *Notice of Proposed Rulemaking*, 22 FCC Rcd. 10,609, 10,636-37 (2007) (concurring statement of Commissioner Jonathan S. Adelstein)

[104] Wireless E911 Location Accuracy Requirements, *Order*, 23 FCC Rcd. 4011.

[105] Press Release, FCC, Commissioner Jonathan S. Adelstein Responds to Public Safety Bureau Stay Order (Mar. 12, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280787A1.pdf.

deliberation—to be successful public policymaking tools. Notably, rulemakings need not be viewed as either/or tools to the use of adjudication, but can actually follow from and be informed by adjudication. Finally, rulemakings must be managed with appropriate oversight—neither rushing issues to a premature judgment nor allowing them to linger without any resolution.[106]

B. Adjudications, Enforcement, and the Use of ALJs

The FCC so seldom uses adjudicative processes that some observers overlook the fact that the agency is authorized to use them at all. Indeed, when the agency conducts an adjudication, the process looks nothing like traditional adjudicatory processes. After all, the FCC often provides no opportunity for discovery, the submission of evidence under oath, the open selection of witnesses, or cross-examination. Consider, for example, the recent *Comcast* case involving that company's network management processes.[107] In that case, the FCC styled the proceeding as an adjudication even though it did not use any judicial-like process—i.e., the actual proceeding mirrored the agency's rulemaking processes noted above. Indeed, that proceeding once again evoked the all too familiar complaints by dissenting Commissioners that they were forced to vote on an Order without the benefit of sufficient time to evaluate its substance.[108]

The FCC's management of the *Comcast* case in a fashion more akin to a rulemaking should not surprise observers of the agency. After all, the FCC only employs two ALJs and they rarely are given assignments to handle adjudicative proceedings. As for the Enforcement Bureau, its processes are often managed with a level of political oversight and a lack of commitment to neutral determination of complaints. Consequently, it is not empowered to act effectively on complaints and has failed, according to a GAO report, to resolve many of them or explain why no action was taken.[109]

Going forward, the FCC has an important opportunity to invigorate its enforcement program and use it in a more strategic matter. As for enforcement, the FCC needs to develop a better capability for enforcing its rules in a credible manner so that it can, in appropriate instances, shift from its legacy focus on restricting what parties can do before-the-fact to evaluating the impact of actual behavior after-the-fact. In the case of spectrum policy, for example, the FCC's legacy orientation means that spectrum licensees are restricted in how they can use their spectrum so that they avoid even the theoretically possible creation of interference—as opposed to making a showing that they created interference in practice.[110] To be sure, the FCC

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[106] For a comprehensive assessment of the rulemaking process at administrative agencies (with a focus on the FCC), see GAO, FURTHER REFORM IS NEEDED TO ADDRESS LONG-STANDING PROBLEMS (2001), http://www.gao.gov/new.items/d01821.pdf.

[107] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008) [hereinafter *Free Press Complaint*].

[108] *Id.* at 13,088 (dissenting statement of Commissioner Robert M. McDowell) ("Commissioner Tate and I received the current version of the order at 7 p.m. last night, with about half of its content added or modified. As a result, even after my office reviewed this new draft into the wee hours of the morning, I can only render a partial analysis.").

[109] GAO, FCC HAS MADE SOME PROGRESS IN THE MANAGEMENT OF ITS ENFORCEMENT PROGRAM BUT FACES LIMITATIONS, AND ADDITIONAL ACTIONS ARE NEEDED 5 (2008), http://www.gao.gov/new.items/d08125.pdf.

[110] For a discussion of this issue, see Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 558-68 (2008); Weiser, *supra* note 17, at 26-28.

has experimented with the model of allowing greater front-end flexibility in return for after-the-fact oversight,[111] but this approach is the exception.

To appreciate the limited development of the FCC's enforcement processes, consider the longstanding complaints that satellite radio providers were violating the terms of their licenses. In particular, as Commissioner Tate put it, Sirius Satellite Radio "failed to comply—knowingly and repeatedly—with the specifications for its FM modulators and the terms of its Special Temporary Authorizations ("STAs") for more than five years."[112] In the face of this problem, one might suspect the FCC had conducted a vigorous enforcement proceeding. That belief, however, would be mistaken. In fact, the FCC only took action and entered into a consent decree with the two companies once they were on the brink of receiving approval to merge with one another. Consequently, as a condition of receiving approval to merge, XM agreed to a "voluntary contribution" of $17,394,375 and Sirius agreed to one of $2,200,000.[113]

The FCC's failure to treat seriously the longstanding complaints about Sirius and XM's behavior is emblematic of the agency's lack of commitment to effective enforcement. In failing to enforce its rules effectively and reliably, the FCC both undermines a commitment to rule-of-law values and sometimes ends up making accommodations to parties who violated rules that were not previously enforced.[114] Ideally, the FCC would, in such cases, authorize the Enforcement Bureau to bring cases before ALJs to develop the necessary factual record to either make the entry of consent decrees a meaningful law enforcement act (as opposed to a political negotiation[115]) or lead to an adjudicated decision. In practice, however, the FCC almost never uses its ALJs and, according to its website, its ALJs have decided only three matters since 2005.[116] In fact, the ALJs are reportedly kept busy by being loaned out to the Social Security Administration.

The promise of using ALJs is readily apparent when one evaluates how state agencies manage telecommunications policymaking. In many cases, state public utility commissions are able to use ALJs to hear evidence and create a well developed factual basis for the agency's deliberations.[117] Indeed, in some states, the "ALJs are more independent than state appellate or trial court judges."[118] In using ALJs, state commissions (and federal ones like the Federal Energy

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[111] *See* Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, *Report & Order*, 19 FCC Rcd. 21,265 (2004) [hereinafter *BPL Order*].

[112] Sirius Satellite Radio Inc., *Order*, 23 FCC Rcd. 12,301, 12,324 (Statement of Commissioner Deborah Taylor Tate)

[113] XM Radio, Inc., *Order*, 23 FCC Rcd. 12,325, 12,347 (2008) (consent decree with XM); 23 FCC Rcd. at 12,324 (consent decree with Sirius).

[114] *See, e.g.*, Unlicensed Operation in the TV Broadcast Bands, *Second Report & Order & Memorandum Opinion & Order*, ET Dkt. No. 04-186, 2008 WL 4908842 (Nov. 14, 2008); *see also* Posting of Harold Feld to Wetmachine, *We File Wireless Microphone Complaint: Shure Says Breaking Law Should Be OK If You Sound Good*, http://www.wetmachine.com/totsf/item/1256 (July 16, 2008, 18:53 EST)

[115] The practice of treating enforcement actions as a political negotiation is discussed and criticized in the House Commerce Committee majority report. *See* DECEPTION AND DISTRUST, supra note __, at 18-19, 23-24.

[116] Office of Administrative Law Judges, http://www.fcc.gov/oalj (last visited Dec. 19, 2008).

[117] Robert C. Atkinson, *Telecom Regulation For the 21st Century: Avoiding Gridlock, Adapting to Change*, 4 J. TELECOMM. & HIGH TECH L. 379, 396 (2006) (noting that state PUCs, unlike the FCC, use ALJs regularly and arguing that the FCC should begin using them effectively).

[118] Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 571 (2001).

Regulatory Commission) separate the trial staff so that they do not interact with the staff persons who advise the commission in its role as adjudicator.

In conceiving the appropriate role for ALJs, it is important to appreciate that they need not be used to decide matters of regulatory policy *per se*. Rather, they can merely be asked to determine the relevant facts, which is their comparative advantage. Take, for example, the *Comcast* decision, where the FCC attempted, using a paper record, to evaluate what types of network management techniques Comcast used. In so doing, the FCC relied on the self-serving and unexamined statements presented in that process and reached a judgment vulnerable to the criticism offered by Commissioner McDowell: "[t]he truth is, the FCC does not know what Comcast did or did not do."[119] The FCC could instead have referred the matter to an ALJ to render a set of proposed factual findings pursuant to established procedures that would have enabled the agency to better understand the relevant facts and make a more informed policy judgment.

In contemplating a role for ALJs, it is important to recognize that this model can be implemented in more or less effective ways. At the FTC, for example, the use of administration adjudication can undermine that agency's effective and expeditious resolution of disputes when personnel rules prevent the agency from using ALJs with relevant expertise in antitrust or consumer behavior. To address this issue, the agency has recently proposed new rules to expedite the process, has experimented with using Commissioners to sit as ALJs (although that raises questions about prejudging issues), and has asked Congress to allow it to select ALJs with relevant experience. Nonetheless, even assuming that the FTC improves its administrative litigation process, some have leveled the more fundamental criticism of this model of decision-making that it often leads to the pre-ordained results sought by the FTC.[120] This cautionary concern, to the extent it counsels against administrative litigation in the FTC context, is far less applicable in the FCC context where "cooking the books" is already an endemic concern as to its rulemaking processes. Consequently, the effective use of ALJs by the FCC promises to improve the quality of its policymaking process because it would provide the agency with a more rigorous factual understanding of the relevant issues than can be obtained by sorting through a paper record to identify the salient facts.

C. Merger Reviews

The third principal type of action taken by the FCC is merger review proceedings. Technically speaking, these proceedings are adjudications, but practically speaking, these proceedings are often negotiations where the FCC seeks to leverage its authority to approve the

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[119] *Free Press Complaint*, 23 FCC Rcd. at 13,092 (dissenting statement of Commissioner Robert M. McDowell). As McDowell explained,

> The evidence in the record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee. The rest of the record consists purely of differing opinions and conjecture.

Id.

[120] *See* Douglas A. Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section*, GLOBAL COMPETITION POLICY 12-24 (November 2008), http://www.wilmerhale.com/files/Publication/704e2922-6df7-4bb7-bd88-014695e523b1/Presentation/PublicationAttachment/f5c9a3c8-3a90-4b16-900b-2a54a5ba420a/Melamed_Nov_08_1.pdf

merger to obtain concessions that often have little or nothing to do with the competitive issues raised by the transaction.[121] In his criticism of this process, former Chairman Powell noted that it "places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale."[122] Thus, unlike the Justice Department, the FCC does not make any effort to ensure that there is "a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions."[123] But because the very nature of the proceeding involves "voluntary" concessions, this type of action is outside the scope of judicial review.

In conducting its merger reviews, the FCC often engages in a form of the rushed judgments that it makes at the end of a rulemaking proceeding. Consider, for example, the review of the merger between AOL and Time Warner in 2001.[124] In that case, the FCC evaluated whether it should impose an interoperability mandate on AOL's instant messaging service (AIM). In so doing, the agency not only failed to analyze the connection of the remedy to the merger, but it cursorily concluded that it had the authority to regulate in an area outside its traditional mandate. Notably, the FCC concluded that instant messaging and "AOL's [names and presence database] are subject to our jurisdiction under Title I of the Communications Act."[125] As then-Commissioner Powell pointed out in dissent, it was questionable for the FCC to reach such a judgment in haste, as "such a grand conclusion should only be reached after very careful and thoughtful deliberations and full comment by a wide range of interested parties[.]"[126] As to the merits of the FCC's action, there were serious questions at the time that its decision was flawed on competition policy grounds.[127] The passage of two years revealed as much and the FCC decided to remove the condition.[128]

A second flaw in the FCC's use of its merger authority is that the willingness of applicants to negotiate "voluntary conditions" facilitates the agency's tendency to make decisions in an *ad hoc* manner. Despite the fact that such conditions only apply to the merging parties, the FCC sometimes uses such proceedings to decide issues that are otherwise pending in industry rulemakings—leading to one set of rules for those who have merged and another set of rules for similarly situated parties who have not. Consider, for example, the issue of whether local telephone companies should be required to provide "naked DSL" (i.e., DSL service without providing a telephone line). Rather than address the issue in an industry-wide rulemaking, the FCC used the pendency of two merger proceedings involving the largest telephone companies

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[121] One commentator has referred to this tactic as "administrative arm-twisting." Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873.

[122] Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, *Memorandum Opinion & Order* 14 FCC Rcd. 14,712, 15,197 (1999) [hereinafter *Ameritech Order*] (Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part).

[123] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.pdf.

[124] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion & Order*, 16 FCC Rcd. 6547 (2001).

[125] *Id.* at ¶ 148, at 6610.

[126] *Id.* at 6713 (statement of Comm'r Michael K. Powell, concurring in part and dissenting in part).

[127] *See* Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822, 842 (2001).

[128] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion & Order*, 18 FCC Rcd. 16,835 (2003).

(AT&T and Verizon) to impose such a requirement on them alone.[129] Similarly, with respect to network neutrality, the FCC had originally suggested that its Internet policy statement was non-binding;[130] nonetheless, when SBC and Verizon proposed to merge with AT&T and MCI, respectively, the FCC imposed a condition that the companies agree to abide by follow those principles.[131] In urging that the agency not operate in this fashion, then-Commissioner Abernathy highlighted that "the customary administrative weaponry in the Commission's arsenal—rulemaking, enforcement, and so on—does not suddenly evaporate once a merger is approved."[132]

The final flaw that often inheres in the FCC's merger review process is the agency's practice of accepting a variety of "voluntary conditions" that it later declines to enforce. Consider, for example, the FCC's decision to condition the merger between SBC and Ameritech on, among other things, SBC's commitment to entering into thirty markets outside of its region.[133] The sheer ambition of enforcing such a commitment begs so many questions—what constitutes "real entry," is a transitory entry sufficient, etc.—that it did not surprise seasoned observers of the agency that there was little or no follow-through on enforcing the commitment. Nonetheless, the agency continues to impose a variety of conditions that are far from self-executing and are outside its normal regulatory mandates, doing so most recently in the merger of XM and Sirius, where the agency imposed a series of conditions ranging from an "a la carte" mandate to a requirement to provide non-commercial channels.[134] Despite the request of some parties to adopt a specific enforcement mechanism to ensure that such requirements are followed,[135] the FCC declined to do so, suggesting that, once again, the past may well be prologue in terms of enforcing merger conditions.

It would be unfair to suggest that the FCC's merger review processes are invariably and necessarily dysfunctional and that they can only be remedied by stripping the agency of such authority altogether. To be sure, former Commissioner Harold Furchtgott-Roth has made this very claim.[136] This position, however, overlooks that there are successful cases of FCC merger review and the agency's oversight of mergers can be a productive part of the process.[137]

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[129] *See* SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,290, ¶ 211, at 18,392 (2005) [hereinafter *AT&T Order*]; *and* Verizon Commc'ns Inc. and MCI, Inc., *Memorandum Opinion & Order*, 20 FCC Rcd. 18,433, ¶ 221, at 18,537 (2005) [hereinafter *Verizon Order*].

[130] *See* News Release, Chairman Kevin J. Martin Comments on Commission Policy Statement, (August 5, 2005) ("While policy statements do not establish rules nor are they enforceable documents, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband internet access should function."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf.

[131] *AT&T Order*, 20 FCC Rcd. at ¶ 108, at 18,350-51; *Verizon Order*, 20 FCC Rcd. at ¶ 143, at 18,509.

[132] *Verizon Order*, 20 FCC Rcd. 18,433 (Statement of Commissioner Abernathy), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-184A3.pdf

[133] *Ameritech Order*, 14 FCC Rcd at 14,877.

[134] *See* Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd. 12,348, 12,359 (2008).

[135] Public Knowledge and Media Access Project filings, MB Docket -07-57, of July 10, 2008 & July 17, 2007.

[136] Harold W. Furchtgott-Roth, Testimony Before the Antitrust Modernization Commission 5-7 (Dec. 5, 2005) (transcript available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Furchtgott_Roth_statement.pdf).

[137] For a discussion of merger remedies and the appropriate role of regulatory authorities in it, see Philip J. Weiser, *Re-Examining the Legacy of Dual Regulation: Reforming Dual Merger Review By the DOJ and the FCC*, 61 FED. COMM. L. J. 1 (2008).

Consider, for example, the FCC's review of the News Corp./DirecTV merger. In the case, the agency stuck to devising competition policy remedies that were necessitated by the merger.[138] Notably, the Justice Department concluded that the FCC action "addresse[d] the Department's most significant concerns with the proposed transaction[]" and the FCC's action justified its decision to close its investigation.[139] In imposing a set of conditions as part of clearing the merger, the FCC did not adopt a standalone regime that it would be unlikely to enforce, but rather imposed a set of requirements that were harmonized with its existing regulatory requirements.[140] Finally, as for the rules imposed as part of the merger that had no counterpart in the FCC's regulatory requirements, the agency developed a special procedure of the kind it declined to adopt in the XM/Sirius matter—i.e., it instituted an arbitration regime with appeal to the Commission.[141]

IV. Toward Data-Driven Decision-Making

The FCC has yet to develop a model of generating information and insights that can inform its policy-making agenda. This Part outlines how the agency could seek to obtain better information, elicit more effective public input, and, finally, enlist the public to play a more constructive role in the agency's work. First, it highlights the importance of commissioning and publishing research that underlies its conclusions. Second, it calls for a more effective partnership with other resources that can provide valuable analysis and insight. Third, it makes the case for a more self-conscious strategy for developing sources of data. Finally, it explains that there are a number of strategies the agency could use to involve the public in its decisionmaking.

A. A Commitment to Independent Research

The FCC has failed of late to commission, support, and use truly independent research. Over the last several years, this tendency has eroded both the intellectual credibility and legal validity of the agency's rules. To address this failing, the FCC must commit to seeking out relevant sources of data and engaging in data-driven analysis as well as ending its habit of relying on single points of data that, in many cases, it avoids sharing for analysis and criticism. In so doing, the FCC should re-establish the tradition of an empowered Chief Economist and Chief Technologist, both of whom should be essential parts of an Office of Strategic Planning and Policy Analysis (OSPPA) that develops published working papers to inspire constructive discussions and farsighted analysis. In recent years, both positions have been filled only sporadically and very few OSPPA working papers have been published. Worse yet, the ethic of honest intellectual engagement is treated as a foreign concept, with a widespread belief that employees who "express an opinion, even if based on fact" are subject to being "demoted, reassigned, or hounded out of the agency."[142]

To begin on a positive note, it merits appreciation that two of the FCC's signature achievements over the last forty years emerged from independent research commissioned from

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[138] General Motors Corporation & Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, 19 FCC Rcd. 473, at ¶¶ 172-179, at 552-56 (2004) [hereinafter *News Corp. Order*].
[139] Press Release, US Dep't of Justice, Justice Department Will Not Challenge News Corp.'s Acquisition of Hughes Electronics Corp. (Dec. 19, 2003) (available at http://www.usdoj.gov/opa/pr/2003/December/03_at_714.htm).
[140] *News Corp. Order*, 19 FCC Rcd at ¶¶ 127-132, at 531-35.
[141] *Id.* at ¶ 177, at 553-56.
[142] DECEPTION AND DISTRUST, supra note __, at 21.

outside of the agency. First, consider the case of the *Computer I* decision,[143] where the FCC sought to protect competition in the data processing industry and keep it free of regulation. To develop its rules in that case, the FCC contracted with the Stanford Research Institute to analyze the comments and develop a proposal for the agency's regulatory strategy. Similarly, in the case of the Part 68 rules,[144] which facilitated competition in the equipment market and ended the almost decade-long effort by AT&T to avoid the letter and spirit of the *Carterphone* decision,[145] the FCC contracted with the National Academy of Sciences to define the relevant interface to the public switched telephone network for terminal equipment. In both cases, the FCC's regulations were upheld by the courts and were a huge success in practice.

The *Computer I* decision is a remarkable FCC decision and an important guide to policymakers for a number of reasons. First, the agency examined in that case an issue in a pro-active fashion and sought independent analysis to guide its judgment. Second, the decision reflected a commitment to considering the interests of the innovator who is not before the Commission in a particular proceeding. (The same praise is owed to the FCC's extension of the Part 15 rules to authorize the use of spread spectrum, ultimately leading to the development of wi-fi technology.[146]) Finally, the FCC engaged in ongoing reassessment of the effects of the decision, ultimately revising it as the agency evaluated the relevant economic issue and technological changes.[147]

Over the last several years, the FCC has encountered increasing judicial hostility and criticism for its management of research related to its decisions. Consider, for example, the FCC's Broadband over Powerline decision.[148] That ruling sought to move to an after-the-fact model of spectrum management, thereby evaluating interference between different users in practice rather than in theory. This effort to generate more real world data emerged from a flawed FCC decision-making process whereby the agency failed to make public the initial spectrum measurements that informed its judgment that this change in regulatory strategy was appropriate. Consequently, the D.C. Circuit reversed the FCC's decision, underscoring that the Administrative Procedure Act requires that agencies make public "the 'technical studies and data' upon which the agency relies" to establish binding regulations.[149] In so doing, the D.C. Circuit revealed some of its impatience with the FCC's operating practices, noting that "[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment[]"[150] and that "the Commission can point to no authority allowing it to rely on the [unpublished] studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed."[151]

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[143] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision & Order*, 28 F.C.C.2d 267 (1971).
[144] 47 C.F.R. § 68
[145] Use of the Carterfone Device in Message Toll Telephone Service, *Decision*, 13 F.C.C.2d 420 (1968).
[146] Thomas W. Hazlett, *A Rejoinder to Weiser and Hatfield on Spectrum Rights*, 15 GEO. MASON L. REV. 1031, 1038 (2008).
[147] *See* Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 129-33 (2003).
[148] *BPL Order*, 19 FCC Rcd. 21,265.
[149] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).
[150] *Id.* at 237.
[151] *Id.* at 239.

The last two media ownership proceedings revealed a similar missed opportunity to generate, evaluate, and utilize thoughtful research. In the 2003 effort to evaluate the optimal regulatory strategy for restricting media ownership, the FCC sought to develop a "Diversity Index" to structure its regulation of the broadcast industry.[152] When the agency adopted its rules, it failed to provide parties a sufficient opportunity to scrutinize and provide feedback about the scope and nature of the Diversity Index. Consequently, the Third Circuit reversed the FCC in *Prometheus Radio Project v. FCC*,[153] highlighting that:

> As the Diversity Index's numerous flaws make apparent, the Commission's decision to withhold it from public scrutiny was not without prejudice. As the Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.[154]

The FCC's latest media ownership rulemaking (discussed above) did not heed this counsel and essentially repeated the mistake made in its earlier proceeding. In particular, the agency not only did not endeavor to rest its decision on more supportable grounds, it actually ignored the research that the agency itself was developing. As Mark Cooper described the most recent proceeding:

> In its haste, the new research agenda devoted little attention to defining and operationalizing the goals of the Communications Act. This tunnel vision ignored efforts by the FCC to understand its policy goals in the period after the court remanded its new media ownership rules. The new agenda led to results-driven research projects. Simply put, the Commission started from the result it wanted and worked backwards.[155]

B. An Effective Partnership with Other Governmental, Academic, and Industry Resources

Over the last several years, the FCC has sought to go it alone. Considering that it regulates an industry in which technological change is exploding and in which a wide variety of stakeholders can provide the agency with valuable insights and information, this strategy is misguided. In the years ahead, the agency should seek to engage an array of entities that can enable it to operate more effectively.

First, the agency should re-engage other governmental agencies, non-profit organizations, and academic institutions. With respect to other governmental agencies, it merits note that there are a number of notable agencies with scientific and technical capabilities with whom the FCC should seek more frequent cooperation, including the Commerce Department laboratories and the standard setting expertise at National Institute of Standards and Technology (NIST). On the state

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[152] 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Notice of Proposed Rulemaking,* 18 FCC Rcd. 13,620 (2003).
[153] 373 F.3d 372, 384 (3d Cir. 2004).
[154] *Id.* at 412.
[155] Mark Cooper, *Junk Science and Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration* 5-6 (2008) (unpublished paper presented at the annual meeting of the International Communication Association, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/3/3/1/1/p233118_index.html).

and local front, the FCC's abandonment of the State and Local Government Advisory Committee and its lack of relationship with State CIOs both greatly hamper its effectiveness in areas ranging from broadband policy to public safety communications. As for non-profit and academic organizations, the agency can, both by reaching out to them, taking their research more seriously, and seeking to generate data that can enable independent research, enlist them as partners in elevating the level of analysis of critical communications policy issues.

In terms of the private sector, the FCC has a number of opportunities to enlist expertise it is currently leaving untapped. For starters, the agency should once again activate the Technical Advisory Committee that, when it was active, was a valuable sounding board on both broad strategic issues and specific tactical ones.[156] As Russell J. Lefevre, president of IEEE-USA, put it, "[d]espite the generally excellent nature of its internal staff, given all of the technical issues within the FCC's jurisdiction, it may be prudent to seek means to supplement the internal technical capabilities of the Commission."[157]

C. Collecting and Sharing Data with the Public

To facilitate data-driven decision-making, the FCC must develop a more coherent and comprehensive commitment to collecting relevant data. At present, the agency lacks the most basic data about how the wireless spectrum is being used and where broadband services are available, for example. Moreover, the agency has failed to make the information it does have in an easily accessible form that can invite outside parties to analyze it and remix it in interesting ways. This failing is not just a missed opportunity. Rather, it fundamentally undermines the agency's ability to execute on its mission. With respect to the prices paid for high capacity lines by businesses (so-called "special access pricing"), for example, the GAO excoriated the FCC's lack of data that, as it put it, is necessary to determine whether the agency's "deregulatory policies are achieving their goals."[158] In short, the FCC has not developed an effective strategy either for collecting data or distributing it.[159]

On the broadband front, there are huge opportunities for the FCC's data collection efforts to play an important role in public policy development. To date, the FCC has abdicated that responsibility, setting up a measurement regime in 1998 (which defined broadband as "200 kilobits" and measured availability by whether anyone in a zip code has broadband service) and leaving that system unchanged for a decade.[160] In the absence of FCC leadership on this front,

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[156] For a broad discussion about how such bodies are and can best be used, see BRUCE L. R. SMITH, THE ADVISERS (1992).

[157] IEEE-USA Sends Letter to FCC Urging Improvements in Consideration of Technical Issues, http://spectrumtalk.blogspot.com/2008/06/ieee-usa-sends-letter-to-fcc-urging.html (June 6, 2008 11:39 EST)

[158] GAO, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES 1 (2006).

[159] *See* Philip M. Philip & Joe Karaganis, *Towards a Federal Data Agenda for Communications Policymaking* (2008) (McGannon Center Working Paper, available at http://programs.ssrc.org/media/dataconsortium/dataagenda; David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138083.

[160] In 2008, the FCC finally did revise its decade long measurement procedure, but that revised model will not go into effect until 2009. Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VOIP)

different states took up the mantle of broadband policy, emphasizing the importance of broadband measurement and mapping and proceeding without the benefit of federal guidance or support.[161] Just recently, Congress unanimously passed the Broadband Data Improvement Act, requiring the FCC to take such a leadership role in this area.[162]

In addition to evaluating the extent of broadband deployment, the FCC (and/or the FTC) could also help to more clearly define level of broadband service and educate consumers in broadband markets as to what they should expect from their provider.[163] Today, for example, no effective disclosure regime exists to make clear what degree of "latency" (or delay) exists in broadband networks or what "up to 1 megabit per second" really means. With a better understood disclosure regime in place, providers would be pressured to compete more vigorously along quality dimensions (as opposed to merely price). Indeed, competition for lower calorie, lower sodium, or lower fat foods only emerged once an understandable disclosure regime for nutritional information was developed and implemented.[164]

The FCC's decision to end the collection of some quality measures in telephone markets suggests a lack of appreciation for the point that, especially in competitive markets, sunlight on the services offered by providers is even more important. In making this decision, the FCC concluded that the absence of similar obligations on other carriers rendered the legacy regime suspect.[165] In short, this Order heads in the wrong direction. The right question is how can the agency develop a systematic portrait of the marketplace so that its data collection efforts are accurate, can inform consumers, and can enable data-driven policymaking in a sound and prudent manner.[166]

Subscribership, *Report & Order & Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 9691, 9762-63 (2008).

[161] PHILIP J. WEISER, A FRAMEWORK FOR A NATIONAL BROADBAND POLICY 14-15 (2008) (discussing Connect Kentucky and California initiatives).

[162] Martin H. Bosworth, *Congress Passes Broadband Data Improvement Act*, CONSUMERAFFAIRS.COM, Oct. 2, 2008, http://www.consumeraffairs.com/news04/2008/10/congress_broadband.html.

[163] For a discussion as to how such an effort could operate, see *The Next Frontier for Network Neutrality*, 50 ADMIN. L. REV. 273 (2008).

[164] As Ellen Goodman related,

> [I]t seems natural that food manufacturers with a relatively good nutritional story to tell would disclose nutritional information. Kraft and Nabisco could then compete on nutritional value or Kraft could use nutritional information to distinguish its premium brands like Progresso. So one might think, and yet the market did not produce widespread disclosure of nutritional information until federal regulation required it. It was the regulation that created a market for nutritional information that now appears to be strong.

Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 139 (2007); *see also* Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* 16-17 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=766287 (noting competition based on nutritional information after government regulation set forth framework for disclosure).

[165] Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, *Memorandum Opinion & Order & Notice of Proposed Rulemaking*, WC Dkt. No. 08-190, 2008 WL 4148882 (2008).

[166] The lack of effective information collection by the FCC creates "information vacuums that hamper just the kinds of analyses that have become an increasingly prominent part of contemporary media policymaking[,]" thereby undermining the agency's ability to engage in data-driven decision-making. Philip M. Napoli, *Paradoxes of Media Policy Analysis: Implications For Public Interest Media Regulation* (2008) (McGannon Center Working Paper, available at http://fordham.bepress.com/cgi/viewcontent.cgi?article=1000&context=mcgannon_working_papers).

On the wireless spectrum front, it is widely appreciated that spectrum is both a valuable and underused resource. One challenge in facilitating the development of a robust secondary market is that many would-be lessors of spectrum licenses do not know who to contact. Thus, an initial challenge for the FCC is to establish a user-friendly spectrum registry that identifies the different bands of spectrum, a contact person, and stated terms for leasing access to spectrum.[167] By posting this information, the FCC would enable entrepreneurs, policymakers, and ordinary citizens to evaluate both potential policy reforms and new business strategies.

In developing new databases of information, it is not sufficient merely to make them available to the public—the FCC also should enable citizens to manipulate information and use it in creative ways.[168] At present, unfortunately, the FCC databases are not only difficult to search, but they do not give citizens the opportunity to use that data and make connections between different data sets—say, broadband deployment and job creation. Consequently, the agency has failed to spur what one commentator calls "wikinomics"—i.e., enabling user-generated content.[169] This trend is just now taking root, as groups of ordinary citizens are combining information related to a variety of topics, ranging from crime rates in Chicago neighborhoods and L.A. communities at risk of fire violations, using technologies like Google Maps to make interesting connections.[170]

Over the last several years, the FCC has often viewed the job of engaging the public as a chore, not a responsibility and opportunity. Significantly, the public should not merely be viewed as interested and informed consumers—say, individuals interested in the best opportunities to purchase broadband connections—but also engaged citizens. Improving the transparency of how the agency operates, upgrading its website to make it more usable, and involving the public in data collection on matters ranging from spectrum use to broadband deployment are all important steps. But such steps must also be followed up with efforts to engage the public.

In soliciting public engagement, the FCC should seek to find ways of getting feedback that is most conducive to shaping regulatory policy. Consider, for example, the difference between a short email expressing an opposition to media consolidation as opposed to a more developed reaction to a specific proposal. To be sure, a large number of emails expressing a basic level of opposition to a particular course of action is a very valuable signal. To help justify its action, however, the agency must develop well reasoned arguments, ranging from ones offered at hearings where information is first presented to citizen panels where individuals can deliberate on issues like a jury and offer their views as a body.[171]

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[167] To its credit, the FCC has recognized that such a registry would help facilitate effective spectrum trading, but has not developed one. In particular, the FCC has concluded that intensive spectrum leasing within the existing administrative regime "would require tradeoffs in multiple dimensions—e.g., time, space, geography, type of use, and technology—and that, in the absence of an effective facilitator, search costs would be high." Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report & Order & Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20,604, 20,692 (2003).

[168] *See* Robinson, *supra* note 159.

[169] DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING (2006).

[170] L. Gordon Crovitz, *Information Age: From Wikinomics to Government 2.0*, WALL STREET JOURNAL, May 12, 2008, at A13.

[171] *See* Nou, *supra* note 88, at 617-24; *id.* at 621 ("citizen deliberation is particularly important when valuing goods that are politically salient or that resonate with social meaning, lest the decision be--or be perceived to be--left to unelected technocrats.").

V. Conclusion

The current policymaking tools and apparatus used at the FCC are broken. Rebuilding the agency's culture will require not only the right leaders for a new era, but a systematic re-examination of the agency's institutional processes with an eye towards building a new culture. In this respect, the reshaping of how the agency operates will be equally challenging and important to the substantive issues that the agency will address in the years ahead.

The enormity of the challenge in reforming the FCC leads some, like Lawrence Lessig, to call for the abolition of the agency. As Lessig sees it, "[y]ou can't fix DNA."[172] In taking this view, Lessig both understates the concomitant challenge of building a new institutional culture that reflects the values discussed herein as well as overstates the impossibility of reform from within. Indeed, like the FTC's impressive re-examination and re-building of its institutional culture over the last 25 years, the FCC has an important opportunity to both pay close attention to and address its institutional failings. Given the FCC's critical role in our information economy, it is critical that the FCC change the way it conducts its business—whether through internal reform or abolition—and policymakers and scholars must take seriously the importance of engaging in this debate as to the FCC as well as to other regulatory agencies that suffer similar defects.

[172] *See* Lessig, supra note __.

Broadband for America
QFR Reponses
House Commerce Committee – Subcommittee on Communications and Technology
Hearing, "Reforming FCC Process," June 22, 2011

The Honorable Greg Walden

1. Your written testimony notes that communications companies should be disciplined first by the market, not by regulation. Could you elaborate on that?

As mentioned when I testified as Honorary Co-Chairman of the Broadband for America coalition, it is time to move away from industry-specific, anticipatory regulation and instead treat communications companies like other businesses throughout the economy. Most of the regulatory framework reflected in the Communications Act was drafted to address a one-wire, monopoly world. Today's broadband networks are not characterized by the antiquated presumptions of natural monopoly that are the basis for much of that statutory framework. This statutory framework often includes a default presumption of market failure and a need for regulation, including regulation of the prices and terms on which providers may offer their services and regulations that inhibit the efficient entry and exit from offering particular services. As the Committee reviews FCC processes, it is vital to turn on its head this fundamental bias in favor of regulation. In its place, regulatory mandates should be necessary only in the face of demonstrated market failures or when essential to advance important consumer protection goals in a narrowly tailored manner.

2. Do you agree that businesses investing in broadband and innovating for their customers deserve to know when the FCC will address a petition or application they file? Could you tell us about the need for regulatory certainty for those making long-term capital investments in the Internet age?

Business and investment decisions by broadband providers must take into account the decisions and indecisions of regulators. Meanwhile, the FCC often fails to produce timely decisions when measured against the pressing decisional demands of the Internet era, and delay and regulatory uncertainty can deter investment and efficient business practices. But even more important than the timing of individual decisions for providing increased certainty is the framework and basic presumptions about the scope and role of regulation with which a regulator is tasked. As noted above, given the competitive nature of today's communications marketplace, it is time to reverse the presumptions in favor of regulation and instead treat communications providers like other businesses throughout the economy, particularly where economic regulation is concerned.

The Honorable Joe Barton

1. Please let me know if you agree with the sections of the bill below. If not, why?

- **Section 5A(b) – Transparency Reforms**

The proposals in section 5A(b) of the draft legislation provide some basic requirements to make information available to commissioners and to the public. The FCC certainly has the authority today to implement the first two reforms in this section that could improve decision making by the Commission. The third reform in this section calls on the FCC to publish unvoted and not final drafts of agenda items prior to an open meeting. While transparency in government is a good thing, it is unclear how this requirement would affect Commission deliberation and decision-making, including the decision to resolve certain issues at open meetings.

- **Section 5A(c) – Sunshine Reform**

As mentioned in my testimony, however well-intended, Sunshine laws have the perverse effect of slowing the deliberative process further by, for example, requiring an open meeting any time more than two commissioners wish to discuss official agency business. For this reason, the draft legislation reasonably balances the goals of transparency and fairness with the need for a deliberative process among Commission colleagues.

- **Section 5A(g) – Shot Clocks**

Business and investment decisions by broadband providers must take into account the decisions and indecisions of regulators. Meanwhile, the FCC often fails to produce timely decisions when measured against the pressing decisional demands of the Internet era. Delay and regulatory uncertainty can deter investment and efficient business practices or prolong the application of outdated regulations. In some of these cases, a meaningful shot clock – one with which the FCC must comply – can prompt timely agency action. But even more important than the timing of individual decisions for providing increased certainty, however, are the framework and basic presumptions about the scope and role of regulation with which a regulator is tasked.

- **Section 5A(j) – Transaction Review Reform**

Regarding mergers and transactions, the primary concerns are that the FCC asserts authority that duplicates the work of other agencies – particularly duplicating the review of competitive effects performed by the expert antitrust agencies – or that it uses transaction review as an opportunity to pursue objectives outside of its statutory authority. This section of the draft legislation would not address the first of these concerns, i.e., FCC's duplicative review of the competitive effects of transactions. But it addresses at least part of the second concern by imposing the requirement that any condition of a merger be squarely within the Commission's statutory authority. While this section addresses a legitimate concern that the FCC imposes conditions unconstrained by its statutory authority, more directly addressing both these issues would be appropriate.

frontier Communications

Kathleen Q. Abernathy
Chief Legal Officer
EVP, Regulatory & Government Affairs

July 22, 2011

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology, Committee on Energy on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walden:

Attached please find my responses to the written questions for the record following my appearance before the Subcommittee on Communications and Technology on June 22, 2011, at the hearing entitled "Reforming FCC Process."

Warm regards,

Kathleen Q. Abernathy

cc: Anna Eshoo, Ranking Member,
Subcommittee on Communications and Technology

Attachment

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The Honorable Greg Walden

1. **The Discussion Draft aims to balance the public's need for oversight with the Commission's need for flexibility by asking the FCC to regulate itself rather than prescribing hard-and-fast rules. For example, it asks the FCC to establish rules to give Commissioners adequate time to review orders and to give the public adequate opportunity to comment on *ex parte* filings. Do you think that such an approach is appropriate?**

   From my experience, all FCC chairmen have implemented informal procedures intended to maintain good communications with fellow commissioners and the public, such as timelines for circulating items to the commissioners and for making information available to the public. As for establishing a more formal process for such actions, it is difficult to anticipate every situation that might arise and the appropriate procedural framework. But it is good policy for the FCC to ensure that all commissioners have adequate time to review and comment on proposed orders. With regard to ex parte filings, most are summaries of proposals already vetted in the formal rulemaking process, but the Commission should maintain the flexibility to seek comment on specific ex parte presentations that present new and novel proposals that require further debate and consideration. It is also important to ensure that any new processes facilitate the FCC's ability to respond to the rapidly evolving technology that drives telecommunications investment.

2. **In his article on reforming the FCC, Prof. Weiser quoted you in arguing that the FCC's practice of tying transaction approval to voluntary commitments leads to ad hoc decision-making and rules that affect some players in industry but not others. Do you agree that rulemaking-by-merger skews the competitive marketplace? If so, how?**

   I agree that rulemaking-by-merger has the potential to skew the competitive marketplace. Simply put, when an individual company is required to adhere to certain requirements while its competitors do not, the competitors gain an advantage. In addition, to the extent that the FCC believes that its rules need to be revised and updated, it should utilize the rulemaking process.

The Honorable Joe Barton

1. **Please let me know if you agree with the sections of the bill below. If not, why?**

   - **Section 5A(b) – Transparency Reforms**

     I agree with the concepts generally provided in section 5A(b), but, as I explain in response to Chairman Walden's question #1 above, proceedings vary significantly and while the prescriptive notice and time requirements in the bill may be useful in some instances, they may hinder the process in others.

   - **Section 5A(c) – Sunshine Reform**

     I agree with Section 5A(c) of the bill.

   - **Section 5A(g) – Shot Clocks**

     Please see my response to the above inquiry regarding section 5A(b).

- **Section 5A (j) – Transaction Review Reform**

  I agree with section 5(A)(j) of the bill.

The Honorable Robert Latta

1. **As you may or may not know, I recently introduced a bill that would require the FCC to conduct a cost-benefit analysis at the time of a Notice of Proposed Rulemaking and again at the time the final rule is issued. By doing a cost-benefit analysis at the time of the proposed rule, I believe this will give the public ample time to comment and critique the FCC's analysis.**

   a. **Given your unique role as a former FCC Commissioner, would you be able to comment on this idea from the FCC's perspective and the effect it may have on rules that concern Frontier Communications?**

      An informal cost-benefit analysis is always a useful exercise because it requires the agency to grapple with what the anticipated public benefits associated with a particular proposal may be versus the economic or other costs that should be taken into consideration. The challenge, however, is how to implement such an approach, the level of formal review that might be required, and whether such an analysis is appropriate for every proceeding. For example, there may be cases when a cost-benefit analysis during a rulemaking would simply result in slowing down the FCC process without benefit to the public.

   b. **Also, could you comment on any recent rules that would have been better informed, or even prevented, had the FCC had a better understanding of the costs and benefits of the action?**

      I believe that a cost-benefit analysis would have been a helpful step in considering both the proposed rules and the final rules in the Open Internet proceeding. It remains unclear what harms needed to be addressed and how the rules would actually benefit consumers.

The Honorable Henry A. Waxman

1. **Do you agree with Professor Levin's assertion in his written testimony that a sophisticated cost-benefit analysis is a resource-intensive and time-consuming activity and to impose this requirement broadly on any rule that "may burden industry or consumers" would not be cost-justified?**

   Yes, I agree that imposing a requirement to complete a formal cost-benefit analysis broadly for every rulemaking may be inefficient. But as pointed out in response to the questions above from Congressman Latta, I believe the Commission has an ongoing responsibility to consider proposed rules in the context of an analysis of cost versus benefit.

2. **Could you envision circumstances in which the FCC's adoption of new rules might create a burden on industry or consumers but should not include a market failure analysis or identification of actual harm to consumers that the FCC is required to perform under the draft legislation?**

All newly proposed rules, particularly those that impose additional financial burdens on the industry or consumers, should be justified by an overarching public interest benefit that can be articulated in the Order. Sometimes that benefit can be calculated in terms of actual dollars but sometimes the benefit is in terms of addressing a particular social need, such as ensuring that hearing impaired consumers have access to mobile phones that are compatible with hearing aids.

3. **Professor Levin pointed out in his testimony that an analysis of market failure may be inappropriate when the FCC is responding to a congressional directive or court order. Do you agree?**

   Yes, I agree.

4. **As a former commissioner, I think you are in a good position to address provisions of the bill seeking to provide adequate deliberation for all commissioners.**

   a. **Do you think commissioners need more time to review items scheduled for an open meeting?**

      Based on my experience I believe that sometimes commissioners need additional time to review items scheduled for an open meeting when issues are particularly complex. The additional time is necessary because the current Sunshine Rules prevent the commissioners from engaging in valuable discussions and require a one-on-one process that is cumbersome and inefficient.

   b. **Would publishing the full text of an agenda item in advance of an open meeting require an additional layer of public comment if changes and edits are made to that text?**

      Publishing the full text of an agenda item prior to a meeting could result in an additional round of public comment.

   c. **Would such a change lead to delays in Commission actions?**

      Yes, it is likely that an additional round of public comment would delay Commission action on an item.

   d. **Do you foresee any impact on efforts to prevent disclosure of nonpublic information?**

      The possibility of disclosure of nonpublic information could have a chilling effect on the filing of any such information with the FCC. This could deprive the FCC chairman, commissioners and staff from receiving needed information. Companies will not willingly share information that they believe could be made available to their competitors.

   e. **Commissioner Copps warns against a never-ending cycle of comments and revisions. He says that at some point, the Commissioners have to do their jobs and be the "deciders." How do we avoid getting stuck in a continuous comment loop? At what point must the FCC just be the "decider"?**

The continuous comment loop usually arises when a proceeding is very complex, there is no obvious answer that is apparent to a majority of the Commission, and technological changes have redefined the issue. As I have previously stated, I firmly believe that revisions to the Sunshine Rule will enable the chairman and commissioners to have a better informed discussion regarding whether further comment is beneficial or merely a delaying tactic.

f. Would the pre-publication requirement have the effect of discouraging the Commission from voting on controversial items at open meetings?

Yes. I believe the pre-publication requirement could discourage the Commission from voting at open meetings, particularly because controversial items often require deliberation by commissioners and staff on final details up until the vote. The pre-publication requirement could delay the vote or require removal of an item from the open meeting agenda altogether.

5. **You support the draft bill's requirement prohibiting the FCC from imposing any condition unless it is narrowly tailored to remedy a transaction-specific harm. How do you respond to Mr. Cooper's assertion in his testimony that this "harm standard" is inadequate to protect the public interest because a substantial part of the Communications Act involves non-economic values of access to communications and speech and thus not amendable to narrow economic tests based on consumer harm?**

While I have stated that merger conditions should be tailored to transaction-specific harm, my position is not limited to a purely economic valuation. Concerns about access to communications and speech as a result of a merger are the kinds of harms (or benefits) that should be taken into account when considering conditions.

6. **In response to a question from Ranking Member Eshoo during the hearing on the voluntary commitments offered by Frontier as part of Verizon-Frontier transaction, you stated that there is "not a huge difference" between the public interest standard and the "harm standard" being proposed by the draft legislation for FCC review of mergers or transactions. Is it your belief that the voluntary commitments on build-out of broadband deployment and meeting broadband needs of anchor institutions within areas to be served by Frontier directly addressed merger-specific harms? Would Frontier be able to offer those voluntary commitments had the draft bill been the law?**

Generally, I believe that "merger-specific harms" could be interpreted as subjectively as the public interest standard. I understand that the additional requirement under subsections 5A(j)(1)(B) and 5A(j)(2) would further limit the types of conditions or voluntary commitments under consideration to only those that could otherwise be implemented by the Commission by rule. I suspect that in order to assure merger approval, such voluntary commitments would occur one way or another.

7. **During your oral testimony, you stated that if Congress were to change the Sunshine Act that alone would solve many of the other problems that the draft legislation seeks to address. Please expand on this viewpoint.**

The Sunshine Act is overly restrictive in prohibiting communication among three or more commissioners outside of a public meeting. The prohibition actually works contrary to the notion of collaborative spirit, discourages creative problem solving, and creates hurdles to a timely and effective decision-making process. And, in some cases, face-to-face discussion may be not only the best way, but the only way for commissioners to effectively deliberate constructively over complex issues. With the ability to hold such discussions, it is likely that commissioners would, on their own, address many of the concerns raised in the proposed bill, such as timeliness for Commission completion of pending items and adequate deliberation by commissioners.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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July 8, 2011

Mr. Brad Ramsay
General Counsel
National Association of Regulatory
Utility Commissioners
1101 Vermont Ave., N.W., Suite 200
Washington, D.C. 20005

Dear Mr. Ramsay:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 22, 2011, to testify at the hearing entitled "Reforming FCC Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please e-mail your responses, in Word or PDF format, to carly.mcwilliams@mail.house.gov by the close of business on Friday, July 22, 2011.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member,
Subcommittee on Communications and Technology

Attachment

N A R U C
National Association of Regulatory Utility Commissioners

July 29, 2011

The Honorable Greg Walden
Chairman
Subcommittee on Communications,
Technology & the Internet
2125 Rayburn HOB
Washington, D.C. 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications,
Technology & the Internet
2322A Rayburn HOB
Washington, D.C. 20515

Re: June 22, 2011, FCC Process Reform Hearing
NARUC Responses to Follow-up Questions

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I am writing to respond to your July 8th request for additional responses to specific questions for the FCC Process Reform Hearing witnesses. I have also included some additional recommendations in response to Chairman Walden's request for suggestions on how to improve FCC procedures. The draft bill includes several obviously needed and long-overdue reforms. NARUC appreciates the opportunity to provide additional input. Our responses to the specific questions posed follows:

I. Questions from the Honorable Greg Walden:

A. You cite in your testimony a letter that NARUC sent to the 2008 transition team at the FCC. Please summarize the recommendations in that letter, especially as they relate to the provisions of the Discussion Draft.

I have attached to this document Appendix A from the December 2008 letter to the Administration's Transition team. The Appendix provides short, mostly one paragraph, explanations of each of NARUC's proposed reforms.

B. The Government Accountability Office has reviewed the FCC's processes repeatedly in the recent past. In GAO-07-1046, FCC Should Take Steps to Ensure Equal Access to Rulemaking Information, the GAO noted that the FCC's rulemaking processes could be improved to increase transparency. In GAO-10-79, Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning, the GAO noted that "[w]eaknesses in FCC's processes for collecting and using information also raise concerns regarding the transparency and informed nature of FCC's decision-making process." Would any of the provisions in the Discussion Draft help address these GAO findings?

The discussion draft has several excellent provisions that would improve operational efficiency and openness at the FCC – some that NARUC has already specifically endorsed. One recommendation NARUC supports, and endorsed by

the GAO in the 10-79 report at page 48, and in the 07-1046 report at page 28, is the discussion draft provision (Section 5A(a)) that requires the agency to publish in an NPRM the actual text of its proposed rule. This is just plain common sense. FCC rules can only be as good as the record they are based upon. Once the agency has created a sufficient record to propose a concrete solution, it should always, in a final NPRM, put the text of its proposed solutions out for comment. This not only increases transparency by assuring stakeholders know to narrowly focus their comments on the relative merits, flaws, costs and benefits of the proposed action. But it also can only improve the agency's ability to evaluate the sagacity of its proposed actions. Other provisions in the discussion draft that address the concerns raised in both GAO reports are transparency reforms in Section 5A(b) and the shot clock provision in Section 5A(g).

GAO-10-79 also raised concern about FCC commissioner access to analyses and whether they have the proper technical expertise. It is difficult to make informed decisions on technical questions and economic analysis without such expertise. NARUC supports the *FCC Commissioners' Technical Resource Enhancement Act* (HR 2102) introduced this Congress by Rep. Stearns to help address this issue. That bill allows each Commissioner to hire a technical expert, computer scientist or engineer, to advise them on technical issues. It would be a useful addition to the discussion draft.

II. Questions from the Honorable Joe Barton:

Please let me know if you agree with the sections of the bill below. If not, why?
Section 5A(b) – Transparency Reforms
Section 5A(c) – Sunshine Reform
Section 5A(g) – Shot Clocks
Section 5A (j) – Transaction Review Reform

NARUC has generally endorsed several of the reform proposals addressed in Section 5A, including:

-the provision in part (b) that assures Commissioners have the specific text of a proposed rule and at least 30 days to consider it; No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that support them;

- the provisions in part (c) – in particular the provisions that streamline Joint Board discussions; however, the final draft should make clear the benefits of the modification to the sunshine rules extends to also cover joint "conferences" under 410(b). This section is covered extensively in NARUC's testimony and NARUC, earlier this year, sent a letter of support to stand alone legislation (H.R. 1009) that parallels the drafts provisions on this topic; and

- the provisions in part (g) that imposes shot clocks on FCC actions; in a 2008 letter NARUC specified that, as this provision does "the FCC should set deadlines on each type of filing where not statutory deadline exists."

NARUC generally acts through policy resolutions sponsored by individual commissioners but ultimately approved either by its Board or the full membership during the course of meetings that occur three times each year. For all the prior supported provisions we had already adopted consistent advocacy points over two years ago. The association has never taken a position on provisions like those outlined in Section 5A(j).

III. Question from the Honorable Robert Latta:

On page 7 of your testimony, you mention that an analysis of a rule's potential benefits and costs, as well as milestones for its review, could focus available resources and expertise on the efficacy of any proposed rule. What are your thoughts on doing this analysis at the time of the NPRM so that the public can comment and critique it?

Specifically, on page 7, NARUC's testimony says:

NARUC has not taken any position on these three interrelated analytical requirements. However, all regulations impose some costs[1] and some type of weighing of the relative costs and benefits is the sine qua non of both agency oversight and reasoned decision making. Such an approach, has been supported by all of our recent Presidents via various Executive Orders[2] – albeit focused on Executive agencies - the most recent released by the current Administration last January.[3] It is never a simple task to complete such an analysis. Most of the costs and benefits come during and after the rule is adopted – which necessarily allows only imprecise, speculative measurement. Still, logically, an analysis of a rule's potential benefits and costs, as well as milestones for its review, could focus available resources and expertise on the efficacy of any proposed rule.{footnotes omitted}

NARUC's testimony is clear that the Association has not specifically endorsed a particular "cost-benefit" test or approach. Moreover, NARUC's testimony specifically points out that in most cases actual costs incurred and benefits realized can only come after a rule is implemented. Even then, some benefits for particular regulations might be hard to quantify.

That said, our testimony suggests that *some type* of weighing of the relative costs and benefits of proposed rules/orders is inherent in the regulatory process. Moreover, NARUC has been clear that - before any proposed rule is adopted – the FCC should both put the text of that rule out for comment and also provide "a proposed rationale and the facts to support the action taken." Therefore, if the agency expects to provide a specific cost-benefit analysis to justify its actions, it should be put out for comment before final agency action.

IV. Questions from the Honorable Henry A. Waxman:

A. I understand that NARUC has endorsed a 30-day minimum requirement for comment periods.

Can you foresee instances in which shorter time frames would be necessary? For example, both the Satellite Television Extension and Localism Act and the Twenty First Century Communications and Video Accessibility Act enacted during the 111th Congress required the FCC to promulgate rules within six months. In such instances, wouldn't a statutory minimum on comment period undermine the FCC's ability to streamline its procedures?

Any FCC decision can only be as good as the record it is based upon. If an agency does not build a good foundation, the rules constructed are much less likely to actually resolve the targeted issue. Allowing an adequate time for comment is the most basic pre-requisite to the construction of an adequate record.

Some have suggested minimum comment cycles aren't necessary when "the agency already knows what it needs to do." Others have suggested that that "fire, ready, aim" mindset is itself a serious problem. Rare is the agency preferred "solution" that cannot be both informed and improved by additional comment. Indeed policy makers are criticized as figuring out first what they think should be done about a particular problem – and only *afterward* (1) seeking information that justify their policy predilections and (2) seeking an interpretation of the statute to justify that action – no matter how little that interpretation resembles Congressional directives. *This is a prescription for poor policy outcomes.* Information collection and analysis should always *precede* final rule choices. NARUC has not taken a specific position on whether an Notice of Inquiry (NOI) should always proceed a Notice of Proposed Rulemaking (NPRM).[1] However, logic suggests, as does this discussion draft, it is better for an agency to first use an NOI to get a grasp of the scope of the identified problem and possible solutions and assure the FCC has statutory authorization from Congress, before determining and proposing the apparent optimal rules to resolve the problem for comment.

The Federal Administrative Procedures Act already provides emergency exceptions to the requirement to take comment on issues (or even provide notice). This covers exigent circumstances where constituent harm or national emergencies (or disasters) indicates rapid agency action is required. Laudably, the draft includes references to these exemptions at page 3 lines 9-11. Perhaps the draft could be more explicit about the continued applicability and scope of these exceptions by including an appropriate reservation focused on those provisions in Sec. 3 of the draft, at page 14, lines 5-8. Agency action without any record or a limited record should be the exception, not the rule. A good record constrains

[1] NARUC has specifically criticized the FCC's use of NPRM's that look a lot like NOIs as the *last* step in the process.

choices. The current FCC process does not always provide such records.[2] But a good record can actually make it easier for any agency to determine the option that has the greatest chance for success with greater confidence.

The legislative examples specified in your question imply that a 30- to 60-day comment cycle might make it impossible for the FCC to act within a six month time frame. While six months is an ambitious time frame for any agency to complete a rulemaking, I believe the FCC can meet such a deadline and still provide a 30- to 60-day comment cycle. It does seem unlikely that an agency facing such tight timelines would be able to also complete a separate NOI. However, if Congress believes either there is no need in a particular case for a separate NOI or that six months is too short to allow the 30-60 day comment cycle, Congress can provide specific exemptions to the comment cycle deadlines/NOI requirements in that legislation. However, putting constraints on agency's ability to build an adequate record to guide its actions seems a poor policy choice.

Professor Levin stated in his testimony that in 1993, the Administrative Conference of the United States recommended that Congress consider requiring a 30-day minimum comment period "provided that a good cause provision allowing shorter comment periods or no comment period is incorporated." Would you support this good cause exemption?

NARUC has not taken a specific position either for or against such a provision. However, we have never opposed the existing "good cause" exception that allows no comment periods included in the federal Administrative Procedures Act.

Would you support similar requirements at the state public utility commission level? Which requirements under the discussion draft would you support being imposed at the state level?

State commissions – which are almost all multi-sector - typically do a much better job of both creating good records for making decisions – records that actually do constrain agency options, and also assure transparency. Often the States rules are more rigid than those applicable to the FCC. Unlike the FCC, they are subject to intense and regular scrutiny by State media and regular "feedback" from constituents. The problems the proposed reforms target at the FCC are not prevalent at the State level. The Association has taken no position on this issue, but my personal view is the imposition of these proposals would be unlikely to improve State decisionmaking.

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[2] As Judge Posner explained in observing the FCC's handling of the finsyn rules,"[t]he nature of the record compiled in a notice-and-comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence – further enlarges the commission's discretion and further diminishes the capacity of the reviewing court to question the Commission's judgment." *Schurz Communications v FCC* , 982 F.2d 1043, 1048 (7th Cir. 1992). Compare the suggestions NARUC proffers in the attached appendices.

B. Could you offer your own definition or interpretation of what it means for the FCC to impose "additional burdens on industry or consumers" through its rulemaking?

NARUC has never taken a specific position that provides insight on this question. As a factual matter, most prophylactic and reporting measures impose at least some additional burdens on some segment of the industry in the form of compliance costs or consumers in that they ultimately bear the costs of such oversight. In the case of forbearance action or elimination of outdated requirements – some balancing of the relative costs/benefits is usually required by the statute. Assuming the analysis is done correctly and the targeted rule is no longer needed, presumably the rule would not impose net additional burdens on anyone.

While the discussion draft contained many provisions that NARUC supports and would improve transparency and operations at the FCC, it did not specifically address a few other FCC process reforms that NARUC has already endorsed, including:

FCC Commissioners need additional Technical Resources to do their jobs.

As mentioned earlier, the *Discussion Draft* can only be improved by incorporation of the provisions of the *FCC Commissioners' Technical Resource Enhancement Act* (H.R. 2102) introduced by Rep. Stearns earlier this year. The bill allows each FCC Commissioner to appoint to its staff an engineer or computer science professional to provide expert counsel on technical matters before the agency. NARUC passed a resolution on this precise point in February 2009, which, among other things, pointed out that proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering.

Reform of the FCC's Forbearance Procedure is overdue.

Another long overdue process reform that should be incorporated in this bill was introduced in 2008 by Rep. Dingell, the *Protecting Consumers through Proper Forbearance Procedures Act* (H.R. 3914). At its 2008 Winter Meetings, the NARUC Board of Directors adopted a resolution calling for modification to the current FCC forbearance procedures. The resolution noted that States are uniquely equipped to provide detailed, market-specific data regarding the state of competition that the FCC must consider in conducting its forbearance analysis and outlined recommended changes to forbearance procedures. Among those recommendations was a suggestion for Congress to eliminate the "deemed granted" provision in the statute. That is precisely what Rep. Dingell's *Forbearance Procedures Act* does. This is not just a fairness issue. It also has very specific and potentially deleterious policy impacts. As the current FCC forbearance procedure provides, if the agency fails to act within a one-year period on a petition, a petition is "deemed granted". Since there is no decision or rationale presented in such cases, appeals are an exercise in futility. Even if a party or parties submit compelling and overwhelming information that a particular forbearance petition cannot meet the statutory standard – and will definitively harm both competition and consumers--if the FCC fails to act, the petition is granted by operation of law and is virtually bullet-proof on appeal. This is another prescription for poor policy outcomes.

Conclusion

NARUC is committed to working with Members of Congress and other stakeholders to ensure that the benefits of high quality, competitive communications services are available to all Americans. Passage of FCC process reform legislation including the provisions NARUC supported in its testimony and recommended here would be a positive step and help all Americans to have access to cutting edge, high quality communications services at reasonable prices. Thank you and please contact NARUC Legislative Director Brian O'Hara at (202)898-2205, bohara@naruc.org or me at (202)898-2207, jramsay@naruc.org if you would like to discuss this issue further.

Sincerely,

James Bradford Ramsay
NARUC, General Counsel

CC: Members of the Committee on Energy and Commerce

Appendix A – Summary Recommendations for FCC Reform from NARUC's December 12, 2008 Letter to the Obama-Biden Transition Team

[A] Due Process/Fair Notice & Opportunity to Comment: ***Maintain a "circulated" order list.***

Not all FCC actions are handled at agenda meetings. The FCC Chairman circulates proposed orders on rulemakings and adjudications for action "on circulation". The Chairman also circulates items to other Commissioners at least three weeks before an agenda meeting. The recently adopted practice of maintaining on the webpage an up to date list of items on circulation gives interested parties notice that some action in a particular docket is imminent. It should be continued.

[B] Due Process/Fair Notice & Creating a good record for decision: ***Put the proposed text/rationale of Rulemakings/Orders on Rehearings out for comment.***

Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This ***revives*** an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions. This process should include recommended decisions of any Joint Board or action on those recommendations. Other federal agencies' present a reasonable model for FCC action, e.g. the Federal Energy Regulatory Commission.

[C] Due Process/Fair Notice & Creating a good record for decision: ***Put the proposed text/rationale of "precedential" adjudications out for comment.***

Often, the FCC effectively creates a rule in an individual adjudication (or FORBEARANCE proceeding). In those cases, the FCC should publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration of the record of the proposals. Note this could occur either *sui sponte* or – in the case of forbearance proceedings - on motion of an outside party (if a STATE or other FEDERAL agency or entity files the motion - it should happen without further vote or consideration by the FCC chairman or commissioners).

[D] Due Process/Timely Relief: ***Set deadlines for action on each type of filing.***

The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to "act" on USF Joint Board recommended decisions within one year.

[E] Due Process/Timely Relief: ***Publish/Release orders within 30 days of adoption.***

Publish any order, decision, or report within 30 days of FCC adoption and publish annually a report to Congress cataloging any delays between adoption and release that exceed this deadline (it should be a very short list).

[F] Due process/Creating a good record for decisions: ***Provide opportunity for cross examination of those that provide record submissions that support the proposed action.***

Facts should constrain the options available to any agency. At the FCC they do not. The FCC is free to

pick and choose among anecdotal data and sometimes mere assertions as a basis for Commission action. The FCC should list the factual submissions that underlie projected action in important rulemakings and allow for sworn in-person cross examination of the party that provided those submissions.

[G] Efficiency – Sunshine Rules: *Drop the Artifice and require face-to-face Commissioner negotiations.*

Bring back multiday FCC Commissioner open negotiation agenda sessions - or lift the sunshine rules for face-to-face FCC commissioner negotiations. The current "Sunshine rules" do not prevent decisions from being made out of the Sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient. If the Sunshine rules cannot be eliminated and a majority of FCC commissioners cannot be involved in discussions on pending matters in private - then the FCC should consider going back to the multi-day public negotiation sessions from the 70s. Many State commissions do what the FCC used to do - have open debates in a public forum (with a transcript) on issues pending before the agency. It certainly would require FCC Commissioners to spend more time and effort preparing for discussions on draft orders – which can only improve the result.

[H] Due Process/Efficiency – Federalism: *Adjust the ex parte rules to allow efficient operations.*

Change the current ex parte rules to allow States the same ex parte treatment as Congress and other federal agencies OR at least modify the rules as they apply to State members of Federal State Joint Boards to allow free discussion with other State commissions impacted by the Boards' deliberations.

GENERALLY: Written or oral presentations from State commissioners or State staff members to FCC commissioners or FCC staff members should, like communications from other federal agencies or Congress, be exempt from certain of the FCC's ex parte restrictions - specifically, State agencies logically should be included within § 1.1204 (a) (5) which exempts presentations "to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision."

FOR STATE JOINT BOARD MEMBERS: NARUC specifically endorses changes to the ex parte rules to accommodate the special status of State members appointed to joint boards. Discussions with State members, provided that they are not of substantial significance and are not clearly intended to affect the ultimate decision, should not be subject to any disclosure requirements. Also, written or oral presentations or discussions limited to NARUC State commissioners or State staff members, should also be exempt, provided that new factual information that is relied upon in a final decision is disclosed not later than the time of issuance of the decision. This should encompass also 1) all communications (and related materials) by State commissioners or staff made during meetings, both regular and special, both formal and informal, where attendance is limited to State commissioners, staff and FCC representatives, and at which the work of a Joint Board or the FCC in relation to a Joint Board proceeding, is discussed; as well as 2) presentations by one or more State commissioners or staff members to one or more State members or staff members on a Joint Board, provided that the latter does not receive any written materials. These changes reflect the special relationship between State Joint Board representatives and other State commissions.

RATIONALE: It is clear the joint boards established under the Section 410 of the Communications Act of 1934 are designed to give all the States representatives on certain issues of mutual concern to State and Federal regulators at the adjudicatory level. In the case of State-specific disputes under (a) the representative "character of the State participants is crystal clear and direct because the statute requires the FCC to appoint a member "from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed." In the case of Joint Board's established pursuant to 410(c) it simply is not practical to have a State commissioner representative on the Joint Board from all 50 States, the U.S. Territories, and D.C. Accordingly, Congress chose to allow NARUC to appoint "representatives" to represent ALL the States. So, the FCC should modify the ex parte rules in a way that recognizes that State Commissioners that are not appointed to a particular Joint Board - are NOT the same as other parties to a Joint Board proceedings - at least with respect to their communications to their "representatives" on the Joint Board. The Joint Board process was clearly established to give the Sovereign States, and their commissioners - all of whom are sworn to protect the public interest just as their federal counterparts - significantly greater access to and input into rules and procedures that clearly impact them and their obligations to serve the public interest directly and significantly. The FCC's ex parte regulations have significantly inhibited free State commissioner-to-State Commissioner Joint Member discussions to the detriment of the Joint Board process. NARUC's proposal is to reduce somewhat the filing requirements on communications ONLY between State Commissioners and their Congressionally specified "representative" State Commission Joint Board Members. The focus is not on the State to FCC proposal outlined in the FCC's NPRM. Such reduced requirements on State Commissioner-to-State Commissioner Joint Board Member contacts are consistent with existing ex parte regulations the FCC applies to its own communications with other agencies and the clear intent of Congress that sitting State members on Joint Boards represent the interests of all the States.

[I] Efficiency – Federalism: ***Allow the three FCC members of joint boards to attend joint board closed meetings with their five state colleagues at the same time. (Currently a "Sunshine" act violation.)***

Everyone on Joint Boards (that's seven of the eight members for the USF Joint Board and six of seven members for the Separations Joint Board) can get together and discuss possible action except for one of the three FCC Commissioners. This makes no sense. We end up playing "musical chairs" with the FCC commissioners and waste time explaining to each what has occurred while they were not in the room.

[J] Due Process/Fair Notice & Opportunity to Comment: ***Correct the FCC Forbearance Procedures.***

The forbearance procedure in the Statute is flawed - steps should be taken to reduce the likelihood that any petitions can be granted "by operation of law" and thus be - effectively, immune from appellate review. On February 6, 2008, the FCC put out an NPRM on forbearance procedures under the statute. NARUC filed comments urging the FCC to quickly approve changes to its current procedures to, among other things, include [1]"a strict "complete-as-filed" requirement for forbearance Petitions similar to Section 271 requirements;" [2] policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential and highly confidential information so they can have sufficient data to file detailed and timely comments with the FCC;" and [3] formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States. If the other earlier suggestions to put out for comment proposed forbearance orders that have potentially broad precedential impact are followed, [1] & [3] will necessarily be a part of the change in FCC forbearance handling procedures.

[K] Efficiency – Federalism: ***Improve the FCC decisional matrix to require State impact assessment.***

Include in the FCC's decisional matrix on any issue the impact of the proposed action on existing state programs and enforcement regimes, the desirability of State enforcement of consumer protection measures, State expertise on local markets and fact finding, and – to avoid useless litigation at taxpayer expense - where appropriate specify States are not preempted or that preemption will be examined on a case-by-case basis.

[L] Efficiency – Federalism: ***Seek a real partnership/coordinate action with State Colleagues.***

Improve policy effectiveness between the States and the FCC by more focused and routine dialogue (as opposed to just reports) at one or more of NARUC's meetings. The FCC can increase regulatory efficiency by attempting to come to agreement with the States on the proper construction of the Statute and the allowed delegation of functions among FCC and State regulators. The FCC should, *inter alia*, conduct forums with NARUC representatives on identifying present and future challenges and opportunities in consumer education, protection, and advocacy. In the area of consumer enforcement, build on the existing efforts to cooperate on enforcement by formalizing a process to discuss jurisdictional issues in a way that best serves consumers.

[M] Efficiency: ***Allow a majority to require an item be place on the agenda of the monthly meetings.***

The FCC internal rules should include a mechanism to allow a majority of Commissioners to require an item (NOI, NPRM, Declaratory Ruling, Forbearance Petition, etc.) - with general outcomes specified in the request - to be placed on the agenda for the required monthly public meetings within 90 days or less of the request.

Appendix B - Resolution on Reform of FCC Management and Process

WHEREAS, The advent of a new Administration under President Obama and the upcoming appointment of new FCC Commissioners have created the atmosphere for much-needed reform at the Commission; *and*

WHEREAS, On December 12, 2008, NARUC's President Frederick Butler sent a letter to then President-elect Obama's transition team outlining in detail specific reform proposals for FCC process and procedure, which the Telecommunications Committee supports; *and*

WHEREAS, On January 26, 2009, Acting Chairman Michael J. Copps announced to the staff of the Commission initial reforms in three broad areas signaling a more inclusive management style, including increasing cooperation among the Bureaus and enhancing communication among the five Commissioners' offices; *and*

WHEREAS, NARUC believes that such management reforms of the Commission present an opportunity to improve not only the internal decision-making processes and the quality and sustainability of the orders of the Commission, but also the collaboration and communication with NARUC and its member commissions; *and*

WHEREAS, NARUC has previously, through resolution, expressed its concern relative to the excessive use of forbearance petitions; *and*

WHEREAS, Several members of the current Joint Boards have expressed concern with the process for referrals, deliberation, decision-making and budget constraints affecting these Joint Board matters, and believe that improvements should be made; *and*

WHEREAS, Recent proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2009 Winter Committee Meetings in Washington, D.C., recognizes and applauds the initial reforms that Acting Chairman Michael J. Copps has announced; *and be it further*

RESOLVED, That NARUC encourages the Commission to make greater use of fact-based inquiries or adjudications and to adopt a timetable in which the Commission takes final action on matters; *and be it further*

RESOLVED, That the Joint Board process for referrals, deliberation, and decision-making and the budget constraints affecting these matters be reviewed on an expedited basis; *and be it further*

RESOLVED, That NARUC encourages the Commission to consider enhancing its capabilities and analysis in finance and engineering; *and be it further*

RESOLVED, That NARUC supports continued efforts by the Commission to foster cooperation with State commissions in traditional areas of joint authority and jurisdiction such as interconnection responsibilities and obligations, consumer protection, E911 and public safety, and universal service.

Sponsored by the Committee on Telecommunications
Adopted by the Board of Directors, February 18, 2009

Appendix C - Resolution on Forbearance Procedures

WHEREAS, Pursuant to Section 10(a) of the Communications Act of 1934 (the Act), as amended, the Federal Communications Commission (FCC) is required to forbear from enforcing any regulation or provision of the Act if it reaches a determination that three broad criteria are satisfied, including consistency with the public interest, protection of consumers, and a finding that the requested forbearance would not result in unreasonable discrimination and unjust and unreasonable rates or terms; *and*

WHEREAS, A statutory timeline of 12 months (which the Commission may extend to 15 months), is given for final action by the FCC; *and*

WHEREAS, If action on a petition is not taken by the FCC prior to expiration of the statutory period, the forbearance requested by the petitioner is deemed granted and becomes effective; *and*

WHEREAS, Such a broad grant of authority to waive application of statutory provisions duly passed by Congress and signed by the President, and regulations approved by order of the FCC, under the above broad criteria and an abbreviated timeline for final action, is quite unusual when considering the normal procedures and regulations governing independent federal agency actions; *and*

WHEREAS, Many incumbent telecommunications carriers have recently submitted a plethora of petitions seeking broad relief from important provisions of the Act and FCC regulations, such as the unbundling requirements of Section 251, and the obligation to provide information under the ARMIS system; *and*

WHEREAS, Many States have the obligation to enforce various provisions of the Act and FCC regulations that, among other objectives, seek to promote wholesale competition and protect telecommunications users, and to a significant extent, rely on the continued enforcement of provisions of the Act in order to achieve their respective State policy objectives; *and*

WHEREAS, The States are uniquely equipped to provide detailed, market-specific data regarding the state of competition that the FCC must consider in conducting its forbearance analysis; *and*

WHEREAS, The Notice of Proposed Rulemaking (NPRM) in WC Docket No. 07-267, released by the FCC on November 30, 2007, identifies possible areas of improvement in the procedures by which the Commission examines such petitions for relief under Section 10(a), including:

a) the absence of a "complete-as-filed" requirement;
b) the lack of discipline and guidelines on the filing of ex-parte comments by the Petitioner, often resulting in substantial evidence filed late in the process, and the concurrent diminution of due process rights for other interested persons and constituencies;
c) the lack of access by each qualified interested person, subject to appropriate protective orders, to confidential and highly confidential information; and

d) the lack of access by State commissions, subject to appropriate protective orders, to such confidential and highly confidential information so that they have sufficient data in order to file detailed and timely comments with the FCC; *and*

WHEREAS, Several members of Congress have introduced bills to amend Section 10 of the Act, including bills to eliminate the "deemed granted" section of the statute (H.R. 3914 and S. 2469), while preserving the ability of the Commission to continue to use the Section 10 process when appropriate; *and*

WHEREAS, The FCC, in establishing an expedited comment cycle for the NPRM, has stated: "We acknowledge that the pendency of numerous forbearance petitions creates an urgency to consider adoption of procedural rules, and we therefore are seeking comment on a relatively short pleading cycle;" *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its 2008 Winter Meetings in Washington, D.C., commends the FCC for initiating this rulemaking and urges the Commission to act on an expedited basis to adopt improvements to the procedural rules governing forbearance petitions; *and be it further*

RESOLVED, That the FCC adopt a strict "complete-as-filed" requirement for Forbearance Petitions similar to Section 271 requirements and also adopt policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential and highly confidential information so they can have sufficient data to file detailed and timely comments with the FCC; *and be it further*

RESOLVED, That NARUC is concerned about the rapid increase in forbearance petitions by incumbent carriers which has created a significant burden on State commissions and interested parties to examine these petitions thoroughly and to provide detailed input to the FCC in a timely manner; *and be it further*

RESOLVED, That NARUC expresses its support of bills in Congress to eliminate the "deemed granted" provision in the statute specifically, H.R. 3914 and S. 2469, and urges prompt action; *and be it further*

RESOLVED, In order to create greater certainty and stability within the telecommunications industry, NARUC urges the Commission to act promptly on this NPRM before additional forbearance petitions are filed and to adopt formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States; *and be it further*

RESOLVED, That NARUC General Counsel be directed to take any appropriate actions to further the intent of this resolution.

Sponsored by the Committee on Telecommunications
Adopted by the Board of Directors February 20, 2008

August 4, 2011

Greg Walden
Chairman
Subcommittee on Communications and Technology

Dear Dr. Cooper:

Attached are responses to the post-hearing questions.

Dr. Mark Cooper
Research Director
Consumer Federation of America
504 Highgate Terrace
Silver Spring, MD 20904

The Honorable Joe Barton

1. Please let me know if you agree with the sections of the bill below. If not, why?

- Section 5A(b) – Transparency Reforms
  I agree with the thrust of this section, however, I have concerns about the specific approach. Individual Commissioners have the right and ability to identify options to deal with Commission business on their own. The Commission does not need a rule to give them this ability (as in 5A(b)(1)). That is their job as individuals.
  Commissioners should have adequate time to review the proposals on which they will be voting as per 5A(b)(2).
  I believe that 5A(b)(3) would be a mistake. I believe the essential reform would be to ensure that proposed rules are published in sufficient detail that the public has adequate time to comment on the actual substance of the rule. Inserting an additional comment period between the publication of the agenda item and the vote would be unwieldy and unworkable.

- Section 5A(c) – Sunshine Reform
  All meeting held subject to this provision should be transcribed and the transcript made available to the public. These meetings should not be part of the official record for purposes of court review.

- Section 5A(g) – Shot Clocks
  Shot clocks are a waste of time. They can never be binding because that would invite abuse by parties who can manipulate the availability of data or otherwise obstruct action.

- Section 5A (j) – Transaction Review Reform
  As I stated in my testimony and at the hearing, the effort to narrow the focus of review of transactions is ill-advised and would be counterproductive. The broad public interest standard of the act is the appropriate standard. To the extent that there are abuses of the merger review process, I propose that final orders be made available for comment as consent decrees are in anti-trust cases.

Washington University in St. Louis
SCHOOL OF LAW

Ronald M. Levin
William R. Orthwein Distinguished Professor of Law

July 22, 2011

The Honorable Greg Waldren
Chairman
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Waldren:

Thank you again for the opportunity to testify at your subcommittee's hearing on June 22, 2011, on "Reforming FCC Process." My responses to the followup questions posed by members of the subcommittee are attached. Please let me know if I can supply any further information or thoughts that would be helpful to the subcommittee.

Sincerely,

Ronald M. Levin

attachment

Washington University in St. Louis, Campus Box 1120, One Brookings Drive, St. Louis, MO 63130-4899, U.S.A.
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Responses to Additional Questions for the Record
Subcommittee on Communications and Technology
Reforming FCC Process
June 22, 2011

Ronald M. Levin

The Honorable Greg Walden

1. Your testimony suggests that the executive orders mandating cost-benefit analyses only require them for significant regulatory actions. Nevertheless, section l(b)(6) of President Clinton's Executive Order 12,866 states that "Each agency shall assess both the costs and the benefits' of the intended regulation and. recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and section l(b)(l) of President Obama's Executive Order 13,563 states that "each agency must, among other things . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)." For a rulemaking that does not count as a significant regulatory action, is it your position that agencies need not in fact complete these analyses or just that agencies must complete these analyses but need not submit them to the Office of Management and Budget?

2. Please explain the differences between (a) the cost-benefit analysis required by section l(b)(6) of President Clinton's Executive Order 12,866, (b) the cost-benefit analysis required for "significant regulatory actions," and (c) the cost-benefit analysis required for "economically significant regulatory actions. Are there any differences between President Clinton's Executive Order and President Obama's Executive Order 13,563 in this regard?

Because these two questions are closely related, I will respond to them in tandem.

EO 12866[1] defines "significant regulatory action" as follows in § 3(f):

> (f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

[1] EO 12866, 58 Fed. Reg. 51735 (1993).

OIRA frequently refers to the rules described in § 3(f)(1) as "economically significant" (although the executive orders do not actually use that term).

In effect, therefore, EO 12866 establishes three categories of rules: (A) "economically significant" rules; (B) rules that fall within §§ 3(f)(2)-(4) and thus are "significant" but not "economically significant"; and (C) rules that fall outside the scope of § 3(f) and thus are not "significant" for purposes of the order. The operative significance of these three categories, in the structure of the order, is that OIRA will review only rules that fall within categories (A) and (B); and the order imposes intensive impact analysis obligations for rules in category (A) that it does not prescribe for rules in category (B). The Obama executive order makes no change in this tripartite classification.[2]

I believe that the two questions posed above are phrased imperfectly, because, for purposes of the executive orders, the term "cost-benefit analysis" properly applies only to the kind of study prescribed for rules in category (A). For those "economically significant" rules, § 6(a)(3)(C) of the order lays out a detailed protocol by which agencies are to prepare what is sometimes known as a "regulatory impact analysis" (although, again, that term does not appear in the order itself).[3] Moreover, OIRA has elaborated on these criteria in a 48-page detailed guidance document, Circular A-4, which expressly applies only to economically significant rules.[4] The Obama administration has reaffirmed and elaborated on the circular, also limiting it

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[2]*See* EO 13563, 76 Fed. Reg. 3821, § 1(b) (2011) ("This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866").

[3]Section § 6(a)(3)(C) states that the agency shall provide to OIRA

> (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits; (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

[4]Regulatory Analysis, OMB Circular A-4, 68 Fed. Reg. 58366 (2003) ("This Circular is designed to assist analysts in the regulatory agencies by defining good regulatory analysis . . . and standardizing the way benefits and costs of Federal regulatory actions are measured and reported. Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1).").

to economically significant rules.[5] Collectively, these guidelines add up to a demanding and sophisticated set of principles for policy analysis. This type of impact statement requirement is, I believe, what people mean when they say that EO 12866 requires agencies to engage in "cost-benefit analysis."[6]

It is true that the order provides in § 1(b)(6) that an agency should "assess both the costs and benefits of " any intended regulation, including a rule that is not "significant" (category (C)). However, this directive does not contemplate what administrative lawyers ordinarily describe as a cost-benefit *analysis*. Section 1, entitled "Statement of Regulatory Principles and Principles," is a basically advisory provision that serves to explain the President's general priorities to executive agencies. It tells agencies to be sensitive to utilitarian factors (costs and benefits), but also to avoid inconsistencies with other agencies' regulations, consult with state and local officials, make regulations simple and easy to understand, etc. Section 1 has very limited operative significance, if any, because OIRA will not review a rule that is not "significant" under § 3(f),[7] and agencies' adherence to these criteria makes no difference on judicial review. Indeed, § 1 speaks only to the criteria by which decisions should be made and does not say that the agency is expected to generate a *document* in which it would discuss costs and benefits as well as the other eleven items on the § 1(b) checklist.

For rules in category (B) – "significant" but not "economically significant" – the order does state in § 6(a)(3)(B)(ii) that the agency must provide to OIRA

> [a]n assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

This paragraph does require the preparation of written material, but even this prescription is not generally regarded as calling for "cost-benefit analysis." The quoted language simply lumps cost-benefit comparisons together with other factors – including statutory compliance, presidential priorities, and federalism concerns – as issues to be discussed in the document that will be submitted to facilitate OIRA's review of the proposed rule. Circular A-4 does not apply

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[5]Regulatory Impact Analysis: Frequently Asked Questions (FAQs), at 1 (OMB, Feb. 7, 2011 ("Executive Order 12866 provides that agencies must submit a regulatory impact analysis for those regulatory actions that are 'significant' within the meaning of Section 3(f)(1) – or what Circular A-4 describes as 'economically significant.'"). *available at* http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf

[6]Curtis W. Copeland, The Federal Rulemaking Process: An Overview, CRS Report RL 32240, at CRS-30 (August 28, 2008) ("For each significant draft rule, the executive order requires the issuing agency to provide to OIRA the text of the draft rule, a description of why the rule is needed, and a general assessment of the rule's costs and benefits. For draft rules that are 'economically significant,' the executive order requires a detailed cost-benefit analysis, including an assessment of the costs and benefits of 'potentially effective and reasonably feasible alternatives to the planned regulation.'").

[7]*See* EO 12866, § 6(a)(3)(A).

to such documents, and, as best I can discover, OIRA has never issued any other specifications or guidance to advise agencies how to prepare the § 6(a)(3)(B) document.

This distinction between "economically significant" rules and other "significant" rules is quite logical, because the alternative grounds that may make a rule "significant" are only incidentally relevant to the kind of economic judgments that a cost-benefit analysis is designed to illuminate. As stated in the definition quoted above, a rule might be deemed "significant" because it would "interfere with an action taken or planned by another agency." § 3(f)(2). In such a situation, an office close to the President has a natural role to play in harmonizing the programs of the two agencies, but a formal cost-benefit study would have relatively little bearing on this function (unless the proposed rule also meets the "economically significant" test). Similarly, a proposed rule may be deemed "significant" because it would "[r]aise novel legal or policy issues." § 3(f)(4). Such issues might involve value judgments on which the Executive Office of the President should have a chance to weigh in and perhaps to dictate an administration position (such as pro-choice versus pro-life; or educational uniformity versus religious accommodation; or national security versus civil liberties). Again, however, a formal cost-benefit study would shed little light on the task of centralized review.

In short, if the subcommittee wants to subject FCC rules to "cost-benefit analysis" requirements on a par with the obligations of executive agencies under EO 12866, it should, in my judgment, apply the requirement to a category of rules that correspond, at least approximately, to the category of "economically significant" rules. If, instead, it were to require the FCC to prepare a cost-benefit "assessment" for all rules that are not "economically significant," it would be imposing a (presumably legally enforceable) duty of highly uncertain dimensions, because, as mentioned, OIRA has apparently not issued any guidelines for agencies to follow in creating these "assessments." Alternatively, if the bill were to require the Commission to follow the protocols that OIRA currently applies to "economically significant" rules only, it would be imposing much more onerous cost-benefit obligations than the Presidents have done in adopting and adhering to the EO 12866 model.

The Honorable Joe Barton

1. Please let me know if you agree with the sections of the bill below. If not, why?

• Section 5A(b) - Transparency Reforms

As I said in my written statement, I take no position about this subsection insofar as it relates to disclosures within the Commission, but I am concerned that the proposed requirement of advance disclosure of agenda items to the public may be impractical or unnecessary in some situations. Also, please see my response below to Representative Waxman's questions 4 and 5.

• Section 5A(c) - Sunshine Reform

Yes, I strongly support this measure.

• Section 5A(g) - Shot Clocks

I believe that requiring the Commission to establish deadlines for various actions, as contemplated by § 5A(g), may be a beneficial planning technique.[8] I assume, however, that the deadlines established under this subsection would not be enforceable through litigation. If private suits to enforce the deadlines were to become available, I would oppose this device, because it could effectively mean that outsiders could set the Commission's agenda by threatening suit. This would be counterproductive to the objective of fostering rational planning. A host of factors might prevent the Commission from finishing a particular project on schedule. If that occurs, it seems appropriate for the Commission to have to explain to Congress and the public why the delay occurred, and perhaps face criticism or a tangible legislative response if the explanation is unconvincing. But I would not want a missed deadline under § 5A(g) to result in an injunction to advance the particular item on the agenda ahead of others that may, in fact, be more pressing. (Of course, if the failure to act more expeditiously would have warranted judicial relief even in the absence of § 5A(g), private parties should be able to avail themselves of their existing APA right to ask a court to "compel agency action unlawfully withheld or unreasonably delayed."[9]

• Section 5A (j) - Transaction Review Reform

I understand the subcommittee's premise that the Commission has been too quick to attach extraneous conditions to its approval of certain merger agreements. However, I wonder whether Section 5A(j) may sweep too broadly. As written, it applies to Commission approval of *any* "transaction" under *any* provision of the Communications Act. "Transaction" does not appear to be a defined term under the Act,[10] so a court might well interpret this openended language quite expansively. Some of its potential applications may be far removed from the types of merger controversies that apparently lie behind the amendment. Yet the amendment would provide that the conditions that the FCC attaches to its approval in any of these contexts must be "*narrowly tailored* to remedy a harm that arises as a *direct result* of the specific . . . transaction" being reviewed (emphasis added).

It is not clear why Congress would want to insist on "narrow tailoring" of conditions in

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[8] *See* ACUS Recommendation 93-4, 59 Fed. Reg. 4670, ¶¶ V.A, V.D (1993) (recommending that agencies "develop management techniques," including "[a]chieving timely internal clearances of proposed and final rules, using, where feasible, publicly announced schedules for particular rulemaking proceedings").

[9] 5 U.S.C. § 706(1). (2006).

[10] *See* Communications Act § 3, 47 U.S.C. § 153 (2006).

all possible contexts. The prohibition might, for example, cast doubt on the Commission's authority to impose a fee as a condition of granting a "pioneer preference" to an applicant for a license to provide pager services. This authority has been judicially upheld under the Commission's ancillary jurisdiction.[11] Such a fee would probably not remedy a "harm" that "directly results" from the license, yet it is not clear why the Commission's imposition of this condition would implicate the problems that some people have discerned in the conditions that the FCC has imposed in approving mergers.

What I heard at last month's hearing did not suggest that the subcommittee has compiled a record of abuses that would warrant this much curtailment of Commission authority. If the subcommittee decides to go forward with § 5A(j), it should consider specifying a more cautious scope for the statute, so that the provision will not give rise to unanticipated consequences. I do not say that mergers alone should be covered, but the prohibition should bear some reasonable relationship to the abuses that the subcommittee believes it has identified. A statute that applies to *all* transactions requiring Commission approval seems unwarranted.

The Honorable Henry A. Waxman

1. You suggested that for § 5A(a)(1)(C) of the draft bill, a good cause provision allowing shorter comment period or no comment period should be incorporated. However, the draft legislation already incorporates 5 U.S.C. 553(b) exempting the bill's requirements for final rules from interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice or when the agency for good cause finds the notice and public procedure to be impracticable, unnecessary, or contrary to the public interest. Does the reference to 5 U.S.C. 553(b) address your concerns? If not, why not?

No, it does not. I agree that § 5A(a)(2) of the draft bill, as written, incorporates the traditional § 553(b)(A)-(B) exemptions for certain types of rules that may be issued without any rulemaking procedure. My point was that a different group of rules might warrant only bare-bones APA procedure as opposed to the *augmented* requirements of § 5A(a)(2). With respect to some rules, for example, the Commission should be obliged to allow at least one round of public comment (making the § 553(b)(A)-(B) exemptions irrelevant), but it should not be obliged to allow two rounds.

2. Do you believe § 5A(a)(I)(B)(i) of the discussion draft requiring the FCC to include in each notice of proposed rulemaking the specific language of the proposed rule makes sense in the following scenarios?

a. When the Commission places a proposal from outside parties out for comment in an NPRM.

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[11] *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996).

b. When there is more than one legitimate alternative that could lead to rules and the FCC seeks comments on all alternatives instead of proposing just one set of rules.

c. When the FCC proposes changes to its internal procedures, such as updating databases, forms, or auction procedures, using NPRMs that typically do not contain rules.

With respect to categories (a) and (b) in this question, I agree with the implication in the question that agencies often, and appropriately, use an NPRM to invite comment on matters of these kinds, without simultaneously proposing specific rule language in the notice. However, that acknowledgment does not detract from the position I took in my written and oral testimony: that, in such cases, the Commission should normally follow up with a second NPRM in which members of the public have an opportunity to react to specific language in a proposed rule. Note that I did suggest in my written statement that there *might* be some kinds of rulemaking proceedings in which the Commission may appropriately issue a final rule without *ever* having given members of the public an opportunity to critique specific rule language. However, I would question whether categories (a) and (b) above are, as a generality, good examples of such proceedings.

Category (c) above poses different issues. At least some of the rules in this category may not be subject to APA rulemaking requirements at all; they may fall within the APA exemptions for rules relating to "agency management" or to "agency organization, procedure, or practice." 5 U.S.C. §§ 553(a)(2), 553(b)(A). Yet the Commission might decide to engage in a notice and comment proceeding anyway, either because of the inherent benefits of that process or because it is unsure whether they are exempt.[12] The new obligation to publish specific rule language in the NPRM might operate as a disincentive to such voluntary adherence to APA procedure. Probably, therefore, subsection (1) of § 5A(a) should be revised so that it, like subsection (2), will be inapplicable to rules that fall within an APA exemption. The drafters of subsection 1 may have assumed that such an exemption was unnecessary because the FCC would not employ an NPRM for an exempt rule anyway; but they may have failed to consider the possibility of a situation in which the FCC seeks comment voluntarily.

3. The draft bill references the need for NPRMs to address "additional burdens on industry or consumers." If so, this triggers a requirement for the FCC to include proposed performance measures for evaluating the effectiveness of the proposal. Is the term "additional burdens on industry or consumers" clear enough to avoid additional debate? Is it possible that how the FCC interprets this phrase becomes the source of further delay and

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[12] *See* ACUS Recommendation 92-1, 57 Fed. Reg. 30102, ¶ 3 (1992) (when issuing exempt procedural rules, "agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment").

potentially additional litigation?

I agree with the implication in the question that this phrase is troubling. As I said in my written testimony, referring to the same phrase in § 5A(a)(2)(C), "[v]irtually any substantive rule that imposes requirements, as distinguished from benefits, might be described as one that 'may burden industry or consumers.'" Thus, a literal reading of the phrase seems unmanageably broad. However, if the phrase is interpreted to refer only to *substantial* burdens, I can foresee a large volume of litigation over the inherently subjective question of whether the anticipated burdens of any given rule would be substantial enough to trigger the bill's requirements.

The problem would be especially acute when applied to the bill's requirements in §§ 5A(a)(1)(B)(ii) and 5A(a)(2)(C)(I) that the FCC must identify "performance measures for evaluating the effectiveness" of a proposed or final rule, because that phrase does not, to my knowledge, have a recognized meaning in administrative legislation.[13] Without a benchmark in established practice for evaluating the adequacy of any particular "performance measures," it would be hard to say in any particular case whether the FCC had complied with the statute. Uncertainty over the scope of the triggering criterion of "additional burdens on industry or consumers" might well compound the confusion.

4. Are you concerned that publishing the text of agenda items in advance of an open meeting that is still subject to further revisions and changes, as required by the draft legislation, may color the way a reviewing court may look at an FCC order?

5. Are you concerned that such requirement may invite litigation attempting to exploit any changes made to the text of agenda items?

These two questions are closely related, and I will respond to them together. The requirement in § 5A(b) to publish the text of agenda items in advance of a meeting may, indeed, give rise to unproductive litigation. My concern is not that a divergence between the announced text and the Commission's subsequent action would "color the way a reviewing court would look at an FCC order." Courts know from their own experience that opinions often change after discussion of a proposed decision. Instead, the problem I foresee is that an order may be challenged as *invalid* if it differed significantly from the text that had been published prior to the meeting. The risk of reversal on this basis might make the Commission reluctant to depart from the previously published text, even if discussion suggested that a change in direction would be desirable. Thus, the requirement could become an impediment to meaningful deliberation on the issues.

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[13]Congress adopted a Government Performance and Results Act in 1993, P.L. 103-62, and updated it in the GPRA Modernization Act of 2010, P.L. 111-352. However, the thrust of this legislation is to induce agencies to engage in strategic planning regarding their overall missions and program activities, rather than to furnish guidelines regarding measurement of the efficacy of individual rules.

Response to Questions for the Record
Subcommittee on Communication and Technology
June 22, 2011
Randolph J. May, President, The Free State Foundation

The Honorable Greg Walden

1. **Your testimony suggests that the communications marketplace report proposed in the Discussion Draft could replace some of the existing reports that the FCC produces. Could you elaborate on that?**

   The proposed marketplace report could replace the periodic Section 706 broadband deployment, wireless competition, and video competition reports.

2. **The Government Performance Results Act of 1993 requires executive agencies to establish performance measures for significant program activities. Although that Act does not apply to the FCC, the Government Accountability Office has for years faulted the FCC for not establishing performance goals to help it oversee some of its programs. *See, e.g.*, GAO-11-11 (Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program), GAO-09-253 (Long-Term Strategic Vision Would Help Ensure Targeting of E-rate Funds to Highest-Priority Uses), GAO-08-633 (FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program), GAO-05-151 (Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program). Do you agree with GAO's assessment that performance measures may be a useful tool to monitor the efficacy of the FCC's rules and programs?**

   Yes, I agree that performance measures may be a useful tool.

The Honorable Joe Barton

1. **Please let me know if you agree with the sections of the bill below. If not, why?**

   - **Section 5A(b) – Transparency Reforms**
     Yes. As to Section 5A(b)(3), I do not believe the text of agenda items need to be published much before an open meeting as long as they are available in advance of the meeting.

   - **Section 5A(c) – Sunshine Reform**
     Yes.

   - **Section 5A(g) – Shot Clocks**
     Yes, as long as it is permissible for the Commission to include in the rule establishing deadlines a "good cause" exception to take into account extraordinary circumstances.

- **Section 5A (j) – Transaction Review Reform**
  Yes

The Honorable Robert Latta

1. **What are your comments on cost-benefit analyses?**

   As stated in my prepared testimony, I generally support imposing a requirement for cost-benefit analyses on the FCC. In my view, for too long, and too often, the agency has failed to incorporate rigorous economic analysis in its decisionmaking. At least in part, this is not the entirely the agency's fault, because Congress has delegated authority to the FCC to act in the "public interest" nearly 100 times in the Communications Act. With such unbridled discretion to act in the "public interest," it is not surprising that the agency often eschews rigorous economic analysis in its decisionmaking. So, I am in favor of amending the Communications Act to require cost-benefit analyses.

   Nevertheless, it is not likely to be practical, or even beneficial, to require the FCC to require a cost-benefit analysis for every rule adopted, modified, or deleted. This all-inclusive requirement likely would unduly bog down the Commission's work, and it could impede the Commission's ability to eliminate more quickly some rules that are obviously outdated and no longer serve any purpose. I suggest applying some threshold for the cost-benefit analyses requirement, say, rules that have a cumulative n annual economic impact of $10 - $20 million or more. A relatively low threshold such as this will ensure that most economically significant rules are subject to cost-benefit analysis, but exclude those with little or no impact, including rules, such as those barring racial or religious discrimination, that do not lend themselves to cost-benefit analyses.

The Honorable Henry A. Waxman

1. **As you know the FCC is currently considering elimination of several legacy reporting requirements, some of which are being done through a notice of proposed rulemaking. Do you think the FCC should issue an NOI before acting to remove outdated rules? Does the legislation, as drafted, hamper the FCC's ability to eliminate existing regulations?**

   First, I do not agree that the same requirements or standards necessarily should apply to the elimination of legacy rules as to the adoption of new ones. Considering the substantial marketplace changes that have occurred in the past decades as a result of increased competition and the introduction of new technologies, the FCC retains too many legacy regulations on its books. Therefore, as I discussed at the hearing, I favor amending the Communications Act to incorporate some form of deregulatory evidentiary presumption into the FCC's consideration of whether or not to retain a rule. This would be consistent with what

I believe to be the expressed deregulatory intent of the Congress that adopted the Telecommunications Act of 1996. Therefore, I favor inclusion of a provision in the bill that would make it easier for the FCC to eliminate outdated rules.

Second, and separately, I have some concerns about requiring the FCC to have sought comment on a NOI/NPRM/petition for rulemaking on the same or substantially similar subject matter before issuing a NPRM. I appreciate that this proposal is intended to address the fact that all too often, and especially in the last six or seven years, the Commission's rulemaking notices have been too open-ended. Often, they have not provided the public with as much of an indication as to the Commission's own thinking as would be desirable. This seemingly deliberate open-endedness leads to public comments that are not as focused as they should or could be be in order to be more useful, facilitates log-rolling, and unduly prolongs agency decision making. But I do not think, at least presently, the remedy for this frequent deficiency is necessarily to add another notice-and-comment round to the rulemaking process in almost all cases. In a dynamic, fast-changing marketplace, this has the potential to delay unduly the adoption of rules that otherwise comport with sound decision nmaking requirements, such as proper cost-benefit and market failure/consumer harm analyses. This is not to say, of course, that issuance of a NOI would not be helpful to the Commission in many instances when it is in an information-gathering mode or is not ready to offer relatively concrete proposals.

2. **Do you agree with Professor Levin's assertion in his written testimony that a sophisticated cost-benefit analysis is a resource-intensive and time-consuming activity and to impose this requirement broadly on any rule that "may burden industry or consumers" would not be cost-justified?**

I agree that, depending on the particular rule under consideration, a cost-benefit analysis can be a resource-intensive and time-consuming – but nevertheless worthwhile -- activity. As stated in my prepared testimony, I generally support imposing a requirement for cost-benefit analyses on the FCC. In my view, for too long, and too often, the agency has failed to incorporate sufficiently rigorous economic analysis in its decisionmaking. At least in part, this is not the entirely the agency's fault, because Congress has delegated authority to the FCC to act in the "public interest" nearly 100 times in the Communications Act. With such unbridled discretion to act in the "public interest," it is not surprising that the agency often eschews rigorous economic analysis in its decisionmaking, or even is unpracticed concerning how to do so. So, I am in favor of amending the Communications Act to require cost-benefit analyses.

Nevertheless, it is not likely to be practical, or even beneficial, to require the FCC to require a cost-benefit analysis for every rule adopted, modified, or deleted. This all-inclusive requirement may well unduly bog down the Commission's work, and it could impede the Commission's ability to eliminate more quickly some rules that are obviously outdated and no longer serve any purpose. I suggest applying some threshold for the cost-benefit analyses requirement, say, rules that have an annual economic impact of $10 million or more. A relatively low threshold such as this will ensure that most economically significant rules are subject to cost-benefit analysis, but exclude those with little or no impact, including rules,

such as those barring racial or religious discrimination, that do not lend themselves to cost-benefit analyses.

3. **Would you agree with Professor Levin that the requirements under the bill go beyond what is required in the Presidential Memo issued by President Obama earlier this year requiring federal agencies to prepare cost-benefit analyses on significant regulatory actions?**

   Yes.

4. **Could you offer your own definition or interpretation of what it means for the FCC to impose "additional burdens on industry or consumers" through its rulemaking?**

   Generally, I think of additional burdens on industry or consumers in terms of incremental economic costs imposed on them by virtue of the regulatory requirement. As stated in connection with my response above concerning a cost-benefit analysis requirement, I do not object to tying the analyses requirements to an annual economic impact threshold as long as such threshold is not too high.

5. **Do you believe §5A(a)(1)(B)(i) of the discussion draft requiring the FCC to include in each notice of proposed rulemaking the specific language of the proposed rule makes sense in the following scenarios?**

   a. **When the Commission places a proposal from outside parties out for comment in an NPRM.**

   b. **When there is more than one legitimate alternative that could lead to rules and the FCC seeks comments on all alternatives instead of proposing just one set of rules.**

   c. **When the FCC proposes changes to its internal procedures, such as updating databases, forms, or auction procedures, using NPRMs that typically do not contain rules.**

   Under the Administrative Procedure Act, 5 U.S.C. § 553, certain changes, such as those related to its internal procedures or updating databases, likely are not subject to notice-and-comment rulemaking. I think the requirement for specific rule language makes sense when a proposal from an outside party is put out for comment, although in that situation the Commission could require that such language be suggested by the outside party. Likewise, if the Commission is proposing more than one alternative, I think it makes sense for it to draft specific rule language for each alternative. The requirement to include specific rule language, along with the proposed analytic requirements, generally imposes a useful discipline on the

agency, focusing its thinking about the best way to frame a rule to minimize harmful impacts, while achieving its intended purpose. Similarly, requiring specific rule language for alternative proposals imposes a discipline that will be useful in comparing and analyzing different proposals.

6. **The draft bill references the need for NPRMs to address "additional burdens on industry or consumers" If so, this triggers a requirement for the FCC to include proposed performance measures for evaluating the effectiveness of the proposal. Is the term "additional burdens on industry or consumers" clear enough to avoid additional debate? Is it possible that how the FCC interprets this phrase becomes the source of further delay and potentially additional litigation?**

   Like very many provisions of the existing Communications Act, there is some ambiguity in the phrase "additional burdens on industry and consumers" and, as with many other provisions, it is possible that the way the agency interprets this phrase will lead to more or less delay and litigation. That said, it should be pointed out that, in one sense, the phrase is a limitation upon the analytical requirements that, absent its inclusion, would apply to consideration of every rule. With such language, the analytical requirements apply only when a rule may result in new burdens. As stated above, I would not object to tying the analytical requirements for new rules to some economic impact threshold as long as such threshold is not too high. And, as I said in my testimony and in response to another question, in light of the development of competition in most communications market segments, I favor inclusion of a deregulatory evidentiary presumption when the Commission is considering whether to retain an existing rule.

7. **Could you envision circumstances in which the FCC's adoption of new rules might create a burden on industry or consumers but should not include a market failure analysis or identification of actual harm to consumers that the FCC is required to perform under the draft legislation?**

   Yes, for example, certain public safety regulations.

8. **What about a situation in which the FCC is adopting technical rules to resolve interference matters? Certain licensees would be "burdened" by the new rules, but should we apply a market failure or harm test in that situation?**

   I believe the Commission would be required to adapt the market failure/consumer harm test to address the resolution of interference matters and would have the discretion properly to do so. But such test is not completely irrelevant to interference matters because it implies the need for the Commission to engage in the type of balancing of interests that appropriately takes into account both the need for a regulatory (as opposed to a market) solution as well as potential harm to consumers of such solution.

9. You support the draft bill's requirement prohibiting the FCC from imposing any condition unless it is narrowly tailored to remedy a transaction-specific harm. How do you respond to Mr. Cooper's assertion in his testimony that this "harm standard" is inadequate to protect the public interest because a substantial part of the Communications Act involves non-economic values of access to communications and speech and thus not amenable to narrow economic tests based on consumer harm?

I do favor the provision relating to the Commission's transaction review process, and as I said at the hearing, I would prefer that Congress go further and adopt a measure that eliminates the substantial duplication of effort that occurs between the antitrust authorities and the FCC with respect to an analysis of the competitive impact of a proposed transaction. I agree that there may be non-economic values, such as diversity of viewpoints, which may be impacted by proposed transactions. But I do not understand the draft bill to prohibit the Commission from considering, and if appropriate, addressing such non-economic harms as long they arise as a direct result of the proposed transaction and as long as any condition